No. 82-1071

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,

and

PETER JOHNSON, as Administrator of the BONNEVILLE POWER ADMINISTRATION, Department of Energy, and DONALD PAUL HODEL, as Secretary of the DEPARTMENT OF ENERGY, and the UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' BRIEF

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QUESTION PRESENTED

Did the Ninth Circuit, in determining that BPA "unreasonably" interpreted its statutory mandate to supply federal power to nonpreference industrial customers, contravene established principles of judicial review and improperly burden Congress's plenary authority to prescribe the scope and application of statutory preference rules?

LIST OF PARTIES AFFECTED

Petitioners Aluminum Company of America, Georgia Pacific Corporation, Pennwalt Corporation, Reynolds Metals Company, Intalco Aluminum Corporation, Crown Zellerbach Corporation, Hanna Nickel Smelting Company, Alumax Pacific Corporation, Kennecott Corporation, ARCO Metals Company, Kaiser Aluminum & Chemical Corporation, Pacific Carbide & Alloys Company, Oregon Metallurgical Corporation, and Martin-Marietta Aluminum Company are direct service industrial customers ("DSIs") of the Bonneville Power Administration.* Petitioners DSIs appeared as Respondents-Intervenors before the Ninth Circuit.

Respondents Public Utility District No. 1 of Chelan County, Public Utility District No. 1 of Cowlitz County, Public Utility District No. 1 of Douglas County, Public Utility District No. 1 of Snohomish County, Public Utility District No. 2 of Grant County, City of Seattle, City Light Department, and City of Tacoma, Department of Public Utilities, are municipal corporations organized and existing under the laws of the State of Washington. Respondents Central Lincoln Peoples' Utility District, Clatskanie Peoples' Utility District, Northern Wasco County Peoples' Utility District, and Tillamook Peoples' Utility District are public corporations organized and existing under the

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*Petitioners' parents, subsidiaries (except wholly owned subsidiaries), and affiliates are listed in Appendix R to the petition for writ of certiorari.

laws of the State of Oregon. Respondent Eugene Water & Electric Board is a part of the City of Eugene, a municipal corporation organized and existing under the laws of the State of Oregon. Respondents public utilities appeared as Petitioners before the Ninth Circuit. Respondent Public Power Council is a non-profit corporation organized and existing under the laws of the State of Washington, consisting of over one hundred publicly owned and cooperative electric utilities. Respondent Public Power Council appeared as a Petitioner-Intervenor before the Ninth Circuit.

Respondents Portland General Electric Company, CP National Corporation, Pacific Power & Light Company, Puget Sound Power and Light Company, Montana Power Company, and Idaho Power Company are investor-owned utilities ("IOUs") who buy power from BPA for resale to consumers in the Pacific Northwest. Respondents IOUs intervened below and were aligned by the Ninth Circuit as Petitioners-Intervenors. However, their position on the merits before the Ninth Circuit was contrary to the position of the publicly owned utilities.

Respondent Peter Johnson is the Administrator of the Bonneville Power Administration, a federal agency within the Department of Energy. Respondent Donald Paul Hodel is the Secretary of the Department of Energy, an agency of the United States. Federal Respondents appeared as Respondents before the Ninth Circuit and, as is apparent from the briefs and the Opinion below, were aligned on the merits with the DSIs. Federal Respondents supported the DSIs' petition for writ of certiorari.

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PETITIONERS' BRIEF

OPINION BELOW

The Ninth Circuit's Opinion as amended, reported at 686 F.2d 708, appears in Appendix A to the petition for writ of certiorari.

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit's Opinion was rendered on April 6, 1982 [JA 53]* and thereafter amended by Order dated September 7, 1982 [JA 66]. A timely petition for rehearing was denied on September 27, 1982 [JA 67], and a petition for certiorari was filed thereafter within 90 days. The Court entered its Order granting the petition for writ of certiorari on March 28, 1983.

STATUTORY PROVISIONS INVOLVED

This case involves the Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act"), Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980). Relevant provisions of the Regional Act are set forth in the petition for writ of certiorari at pp. 1-4. The entire text of the Regional Act is set forth in Appendix B to the petition for writ of certiorari.

STATEMENT OF THE CASE

1. Introduction

Federal electric power is marketed under a variety of laws applicable to different agencies, projects, and geographic areas. Each law establishes the conditions under which power may be sold to different customers. This is the first case under the newest and most unusual federal power marketing law, the Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act"), 16 U.S.C.

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*The appendix to the petition for writ of certiorari is cited herein as "Cert. A." and the joint appendix is cited as "JA". Documents from the administrative record are cited to the appropriate volume and page of the Contract Official Record ("COR").

§§ 839-839h (1980) [Cert. A., at B], described by its Congressional sponsors as "[w]ithout any doubt . . . the most important bill ever to have affected the Pacific Northwest."[1]

Under many laws Congress has simply delegated to an administrative agency authority to sell power to any requesting customer, requiring only that the agency allocate this power first to publicly owned and cooperative utilities ("preference customers") when it lacks sufficient power to satisfy the competing demands of preference and nonpreference customers. The Regional Act's distinctive feature is that it directs by statute the manner in which the Bonneville Power Administration ("BPA") must supply power to individual customers—preference and nonpreference customers alike—rather than leaving BPA to allocate this power administratively. The issue presented is whether BPA reasonably interpreted the Regional Act as having committed the power here in dispute to nonpreference industrial customers, thereby insulating that power from claim by preference utilities.

2. History and Nature of the Dispute

Prior to the Regional Act, BPA marketed power to "preference" customers (publicly owned and cooperative utilities) and "nonpreference" customers (investor-owned utilities ["IOUs"], federal agencies, and direct service industries ["DSIs"])[2] under contracts authorized by the Bon-

[1] 125 CONG. REC. S11,592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) [Cert. A., at C].

[2] The DSIs are electroprocess industries who located in the Northwest primarily during wartime when demand for strategic materials was great and power to produce these materials was not readily available elsewhere. The DSIs became customers of BPA—rather than customers of utilities—at the request of the federal government. The DSIs produce at their Northwest facilities some 30% of the nation's primary aluminum, 100% of the nation's domestically mined nickel, and substantial quantities of other strategic materials. *Pacific Northwest Electric Power Supply and Conservation Act: Hearing on S. 2080 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 92 (1978) (statement of Gordon C. Culp, counsel, Pacific Northwest Utilities Conference Committee).

neville Project Act of 1937 ("Project Act"), 16 U.S.C. §§ 832-832l (1976 & Supp. V 1981). Under the Project Act Congress did not create statutory power entitlements for individual customers, but rather authorized BPA to sell power to any requesting customer provided that priority be given to preference customers if power was insufficient to satisfy "conflicting or competing" applications.[3]

Through the early 1970s BPA had sufficient power to meet all customer demands, and thus had no occasion to allocate power. All regional consumers received low cost federal power whether they were served by preference or nonpreference utilities. In addition, by retaining certain contract rights to interrupt service to the DSIs, BPA was able to develop operating techniques for its hydroelectric system that increased power production, provided low cost reserve power, and reduced rates for all customers. These techniques were made possible solely by the ability of DSI electroprocess loads—unique among BPA's loads—to withstand intermittent interruptions in power service.[4]

By the mid-1970s projections indicated BPA's loads would soon exceed its power supplies. Under the Project Act, BPA lacked authority to acquire more power and was constrained to allocate to preference customers all power not otherwise committed by contract. Thus, BPA

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[3]This "preference clause" is contained in Section 4(b) of the Project Act, 16 U.S.C. § 832c(b), and is incorporated by reference in the Regional Act, 16 U.S.C. § 839c(a). *See* pp. 13-14 *infra*.

[4]*See* p. 8 *infra*. In addition to the specific efficiencies made possible through interruption of DSI loads, service to the DSIs has reduced the cost of power for regional consumers by allowing BPA to achieve early economies of scale, and by returning to BPA revenues in excess of service costs. BPA data show that the DSIs historically have paid rates 22-45% above their cost of service. BPA, U.S. Department of Interior, *Draft Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* ("DEIS") (DES-77-21) Appendix C, Table IV-55 at IV-142 (July 1977).

halted firm sales to nonpreference utilities when their contracts expired in 1973, announced in 1975 that new DSI contracts would not be offered when existing DSI contracts expired between 1981 and 1991, and began planning its first administrative allocation of power among preference utilities, whose individual needs BPA could not fully meet.[5]

BPA's inability to serve nonpreference utilities deprived half the region's consumers of low cost federal power, while BPA's inability to continue serving the DSIs jeopardized DSI operations and threatened to deny BPA important operating efficiencies that reduced rates for all customers. Moreover, while BPA's allocation program was intended to enable utilities to plan for and meet their remaining needs with non-federal power, it only intensified efforts to secure shares of the federal hydro power.[6] All customer groups prepared for costly and protracted litigation, thereby rendering impossible final administrative allocation of existing power supplies and delaying vital planning decisions.[7]

The Regional Act was designed to forestall this enveloping regional struggle over an administrative power alloca-

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[5]*See* House Committee on Interstate and Foreign Commerce, Report (*"House Commerce Report"*), H.R. REP. 976 (I), 96th Cong., 2d Sess. 24-25 (1980) [Cert. A., at D-61 to D-63]; House Committee on Interior and Insular Affairs, Report (*"House Interior Report"*), H.R. REP. No. 976 (II), 96th Cong., 2d Sess. 30-31 (1980) [Cert. A., at E-74 to E-76]; Senate Committee on Energy and Natural Resources, Report (*"Senate Report"*), S. REP. No. 272, 96th Cong., 1st Sess. 17 (1979) [Cert. A., at F-38]. Because the Senate accepted the House amendments to S.885, the bill which became the Regional Act, no House/Senate conference committee report was ever prepared. 126 CONG. REC. E5092 (daily ed. Dec. 1, 1980) (remarks of Rep. Swift).

[6]*See House Commerce Report,* at 25-26 [Cert. A., at D-63 to D-64].

[7]*See, e.g., House Commerce Report,* at 23-27 [Cert. A., at D-60 to D-66]; *House Interior Report,* at 26-32 [Cert. A., at E-68 to E-78].

tion by legislating power entitlements for all customers.[8] Congress required BPA to offer initial twenty-year contracts to both preference and nonpreference customers, "specif[ying] directly how much power each class of BPA customer is to receive, and at what cost,"[9] and granted BPA authority to acquire power to meet its new obligations. By creating statutory entitlements for individual customers, Congress obviated the need for BPA to allocate power during the term of the initial contracts. Preference rules were retained in the Regional Act to govern BPA's administrative allocation of all uncommitted power.[10]

BPA was continuously consulted by Congress in drafting the Regional Act, interpreted its provisions throughout the four-year legislative process, and implemented those provisions through contracts offered to regional customers. As statutorily directed, BPA offered new contracts to each utility—both preference and nonpreference—for power sufficient to meet that utility's net "firm power load," but not for any power that is excess to that utility's "firm power load." In addition, BPA offered new contracts to each DSI for a specified "amount of power," portions of which could be interrupted to protect BPA's "firm power loads" from temporary shortages.

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[8]Rep. Foley summed up the urgent need for legislation:

> [A]llocation of Federal power cannot be avoided; the only issue is whether the reallocation will be legislated by Congress or performed administratively by the Administrator of BPA. An administrative allocation will be fought over for years in the courts because the amount of Federal power is sufficiently large and its cost is sufficiently low that none of the utilities or the industries servied [sic] directly by BPA can afford not to take part in the impending courtroom battles. Without a legislative allocation of Federal power, disruption in the region is virtually inevitable.

House Commerce Report, at 31 [Cert. A., at D-72].

[9]126 CONG. REC. H9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley).

[10]*See* pp. 16-18, 26-28, 34-36, and 41-44 *infra*.

The provisions of the new DSI contracts governing BPA's right to restrict 25% (the "first quartile")[11] of each DSI's power reflect a change in the scope of BPA's restriction rights, and it is this change that is at issue here. Under its pre-Regional Act contracts with DSI customers (the "1975 contracts"), BPA had the right to restrict first quartile power "at any time" [Cert. A., at N-5]. When BPA exercised this right, the power thereby made available was either used to protect BPA's firm power loads from shortages, or was sold as "surplus" power that certain preference utilities—enjoying a priority right to uncommitted power—purchased for resale to entities other than their own retail customers. Under its new DSI contracts, BPA retains the right to restrict first quartile power when necessary to protect its firm power loads, but not to provide preference utilities with "surplus" power.

In September 1981, certain preference utilities challenged in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") the first quartile restriction provisions of the new DSI contracts, claiming those provisions violate preference by denying them priority to a portion of the power BPA uses to serve the DSIs' first quartile. BPA and the DSIs argued that this change in first quartile restriction rights is mandated by the Regional Act: by limiting to the protection of BPA's "firm loads" the purposes for which first quartile power may be restricted, the Regional Act now commits this power to the DSIs and prohibits BPA from restricting the DSIs' first quartile in order to sell surplus power to preference utilities. Although acknowledging that BPA's statutory interpretation found support in the Regional Act's legislative history, the Ninth Circuit nonetheless found that interpretation "unreasonable" and found the disputed contract provisions to violate preference.

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[11]To define its restriction rights, BPA divides the DSI load into quartiles, each equal to approximately 25% of the DSI load.

3. BPA's Hydroelectric Operations and Power Sales Contracts Prior to the Regional Act

a. Power Operations and DSI Service under the 1975 Contracts

Between enactment of the Project Act in 1937 and of the Regional Act in 1980, the Federal Columbia River Power System grew to include thirty dams supplying half the power in the Northwest. During those years, BPA developed techniques for managing the flow of water through this system in a manner that increased power production and revenues, and reduced costs for all BPA customers. These techniques for enhancing system efficiency depend on —and have been implemented largely through—BPA's contract rights to restrict delivery of power to the DSIs. To determine whether BPA reasonably interpreted provisions of the Regional Act governing its rights to restrict power under the new DSI contracts, it is necessary to understand certain features of BPA's hydro system and its service of DSI loads prior to the Regional Act.

Hydroelectric power is generated by water falling through turbines. The quantity of power generated depends on the volume of water, which depends in turn on streamflow levels produced by rain and melting snow. "Firm" power is power whose production can be assured even if streamflows turn out to be no greater than their historically worst or "critical" levels. "Nonfirm" power is the additional power that can be produced if streamflows exceed "critical levels" but whose production therefore cannot be assured.[12]

Although BPA can determine with reasonable accuracy how much firm power will be available during the operating

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[12]BPA, U.S. Department of Energy, *Final Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* ("EIS") (DOE/EIS-0066) IV-69 to IV-70 (Dec. 1980).

year,[13] its ability to determine how much nonfirm power will be available—and therefore its ability to rely on using this power to serve customer loads—is limited by the enormous fluctuation in streamflow levels from year to year.

BPA's utility customer loads—homes, hospitals, schools and offices—are "firm power loads" for which power must be made continuously available.[14] Thus, BPA cannot plan to meet its obligations to utilities with nonfirm power, whose production is uncertain. Among BPA's customers only DSI electroprocess loads can withstand intermittent interruptions in power service without causing serious disruption or damage to production facilities. This feature of DSI loads enables BPA to enhance the efficient operation of its hydro system in two important respects:

> *First*, it permits BPA to plan to serve a portion of the DSI load (the first quartile) with nonfirm power when ample streamflows make such power available, while reserving the right to interrupt first quartile

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[13]Historical records enable BPA to calculate the firm energy its hydro system can produce in any given year. Using the concept of critical water planning, BPA assumes its hydro system will be able to produce at least the quantity of energy that would be produced during the time that it takes to draft reservoirs from full to empty (the "critical period"), if the streamflows that feed those reservoirs are the lowest on historical record ("critical" streamflows). The energy that could be produced during this critical period is referred to as "Firm Energy Load Carrying Capability" or "FELCC." *See id.* at D-8; Mellem, *Darkness to Dawn? Generating and Conserving Electricity in the Pacific Northwest: A Primer on the Northwest Power Act*, 58 WASH. L. REV. 245, 269-70 (1983).

[14]*See Senate Report*, at 26 [Cert. A., at F-53]; Mellem, *supra* n. 13 at 251 n. 47. Utility efforts since the Ninth Circuit's decision to develop loads that can be served with nonfirm power are not relevant to the legal issues presented here. BPA is not obligated under its Regional Act contracts to supply utilities with nonfirm power for any purpose, *see* 16 U.S.C. § 839c(b)(1) and *infra* p. 17, and such loads are not "firm power loads" for whose benefit the Regional Act authorizes BPA to restrict DSI power. 16 U.S.C. §§ 839c(d)(1)(A), 839a(17).

service if "critical" streamflows occur. In this manner BPA uses available nonfirm power to serve a regional load and avoids the cost of acquiring additional firm generating resources to serve that load.[15] Use of nonfirm power to serve the DSIs' first quartile also makes possible reservoir operating techniques that expand available storage capacity on BPA's hydro system and enable BPA to produce more power.[16]

Second, because DSI loads are interruptible, BPA can create low cost power "reserves" through its con-

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[15]Assuming service to the DSIs' first quartile as prescribed by the Regional Act, *see* p. 28, *infra*, BPA projected it could provide the DSIs 96% average power availability without needing firm generating resources for first quartile service. *See, e.g., Senate Report*, at 59 [Cert. A., at F-74].

[16]Reservoir storage on the Columbia River is limited, permitting BPA to control only a small fraction of the natural streamflow in a typical year. If BPA can manage its reservoirs to capture more streamflow, it can increase total power production. DEIS, *supra* n. 4, at Appendix A, II-12, II-42 to II-48. Use of nonfirm power to serve the DSIs' first quartile enables BPA to expand useable reservoir storage and thus produce more power. Nonfirm power, when available at all, normally is available only during spring and summer. Because BPA uses nonfirm power to serve the DSIs' first quartile, it must supply the DSIs with other power during the fall and winter. BPA can produce such power by having the DSIs "borrow" firm power from water stored in reservoirs for future service to the DSIs themselves. By creating more storage space in the reservoirs—a bigger "hole"—before the spring rains and snow melt occur, this technique permits BPA to capture more water in its reservoirs if streamflows turn out to be ample. Because DSI loads are interruptible, BPA can secure this "borrowed" firm power by restricting the DSIs' future firm power if critical streamflows leave BPA with too little water to meet its firm power sales obligations to utilities. *See* EIS, *supra* n. 12, at IV-89 to IV-91; Mellem, *supra* n. 13, at 271-73; Redman, *Nonfirm Energy and BPA's Industrial Customers*, 58 WASH. L. REV. 279, 282-85 (1983). Mr. Redman is one of the authors of this brief.

tract rights to restrict DSI power.[17] All power systems require reserves to protect customer loads; BPA's method of creating reserves is unique, and substantially reduces system costs. In other regions, reserves are provided through costly standby generating facilities that produce power and earn revenue only infrequently.[18] BPA's alternative permits most Northwest generating facilities to earn revenues continuously, thus minimizing the power plants needed to serve regional loads and reducing costs for all customers.[19]

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[17]Although this case involves only BPA's right to restrict delivery of nonfirm power to the first quartile, BPA may also restrict other portions of the DSI load for reserve purposes. BPA can interrupt the entire DSI load instantaneously to avert cascading generating failures (such as the New York City blackouts), and can interrupt half the DSI load to protect utilities from BPA forced outages and peak load problems. In addition, BPA can interrupt the "second quartile" to protect utilities from the delayed completion or poor performance of new BPA power sources, including conservation programs. BPA can interrupt the "third quartile" to secure firm power previously "borrowed" for first quartile service. *See, e.g., House Interior Report,* at 48 [Cert. A., at E-106 to E-107]; Mellem, *supra,* n.13, at 268-69; DSI Contract (1981) § 7, XIV COR 3784-3800 [Cert. A., at H-1 to H-9] [JA 108]. These restriction rights apply to portions of the DSI load served with "firm" as well as "nonfirm" power.

[18]Cohen, *Efficiency and Competition in the Electric-Power Industry,* 88 YALE L.J. 1511, 1515 and n.21 (1979) (Reserve capacity's "capital cost is a major item in the rate base of most utilities. . . . A study prepared in 1975 for the New York interconnected system assessed the cost of meeting the 'one day in 10 years' [power plant failure] standard at $1.6 billion."); EIS, *supra* n. 12, at IV-86.

[19]*See* Letter of BPA Administrator to Hon. Abraham B. Kazen ("Kazen Letter") (Aug. 19, 1980), VIII COR 2339-2340 [Cert. A., at I-9] ("Thus, . . . the fact that the DSI power is nonfirm saves the region the need for another 1.7 conventional power plants. . . . This is one reason why, from a rate impact standpoint, it is beneficial for other consumers that the DSIs are part of the regional power system in the Northwest." *See also* EIS, *supra* n. 12, at IV-86.

Although significantly modified in the Regional Act,[20] BPA rights to restrict DSI power were incorporated in the DSIs' 1975 contracts. Under those contracts[21] each DSI received a specified "amount" of "industrial firm power," which was a mix of firm and nonfirm power.[22] That amount was measured in kilowatts of contract demand and was sufficient to serve each DSI's entire load.[23] BPA was obligated to make this specified amount of power "continuously available,"[24] but retained the right to restrict the first quartile of this power "at any time."[25] By serving the DSIs' first quartile with nonfirm power while charging the DSIs a firm power rate,[26] BPA secured substantial operational and revenue benefits while using its then-scarce firm power to serve its other loads.

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[20]*See* pp. 17, 28-34 *infra*.

[21]The 1975 contracts, known as "Industrial Firm" contracts, could not be executed because of BPA's then-anticipated power shortage and the Project Act's preference clause. By "interim letter agreements" BPA and the DSIs operated in accordance with the 1975 contracts temporarily until new contracts were signed pursuant to the Regional Act. EIS, *supra* n. 12, at IV-79.

[22]XXIII COR 6278 [Cert. A., at N-2]. BPA planned "firm" generating resources to serve three quartiles or approximately 75% of the DSI load with "firm" power, and planned to serve one quartile of this load—the "first quartile"—primarily with nonfirm power. Bernard Goldhammer Memorandum, Exhibit C to Preference Customer Memorandum, filed Nov. 2, 1981, at 5-6 [JA 43]; EIS, *supra* n. 12, at I-15.

[23]Section 4 of the 1975 contracts ("Sale of Power and Amount Sold") sets forth the "amount of power" allocated to each DSI. XXIII COR 6278-79 [Cert. A., at N-2].

[24]General Rate Schedule Provisions § 1.4, XXIII COR 6290 [JA 112].

[25]Section 8(b) of the General Contract Provisions of the 1975 contracts ("Restriction of Deliveries") sets forth this restriction right. XXIII COR 6305 [Cert. A., at N-5]. *See* pp. 8-10 *supra*.

[26]Schedule IF-1 Wholesale Power Rate For Industrial Firm Power, XXIII COR 6285 [Cert. A., at N-3].

Because BPA could interrupt the DSIs' first quartile "at any time" under the 1975 contracts, this power could be used by BPA as a reserve for the protection of BPA's firm load obligations or sold as "surplus" power in accordance with the Project Act's preference rules. However, when first quartile power was restricted for either purpose, BPA was obligated to pay the DSIs "availability credits" (retroactive rate reductions) that would enable them to purchase non-federal replacement power.[27]

b. Service to Utilities

Both prior to and under the Regional Act BPA has provided its utility customers—preference and nonpreference utilities alike—with higher quality service than the DSIs. BPA has no right to interrupt power deliveries to these customers (except for *force majeure*) and is obligated to supply firm power sufficient to meet any portion of their loads that cannot be met with power that they themselves produce. Since only a few of BPA's preference utility customers own generating resources, BPA supplies most of these customers with firm power for their entire loads.[28]

Because utility loads are met with firm power,[29] BPA has never been contractually obligated to supply utilities with nonfirm power. However, prior to the Regional Act, certain preference utilities that owned generators found they could save money by purchasing the nonfirm power made available as "surplus" when BPA interrupted the DSIs' first quartile under the 1975 contracts. By purchasing this power at low nonfirm power rates (rather than the higher rate paid by the DSIs), and using it to serve that

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[27] *See, e.g., id.; see also* General Contract Provision § 10, XXIII COR 6310-12 [Cert. A., at N-5 to N-7]; Kazen Letter [Cert. A., at I-5]; *House Commerce Report*, at 61-62 [Cert. A., at D-122 to D-124].

[28] *See* p. 17 *infra*. Of the 116 preference utilities BPA served in 1978, only 18 owned generators. EIS, *supra* n. 12, at I-14.

[29] *See* p. 8 *supra*.

portion of their loads normally supplied with power from their own generators, these utilities could sell their own power—now "displaced" with BPA's nonfirm power—to other utilities at higher prices. By displacing their own power, utilities owning generating resources were able to arbitrage federal power to other entities.[30]

Displacement is the economic heart of this legal dispute. Although utilities have never been contractually entitled to BPA's nonfirm power, preference utilities enjoy a priority right to purchase "surplus" BPA power. Because under the 1975 contracts the nonfirm power used to serve the DSIs' first quartile could be restricted "at any time" upon BPA's payment to the DSIs of availability credits, preference utilities could exercise their priority rights to purchase this power as "surplus" and use it for displacement and arbitrage purposes. The disputed provisions of the new DSI contracts limit BPA's right to restrict the DSIs' first quartile power, thereby committing this power to the DSIs and rendering it unavailable for purchase as "surplus" by preference generating utilities.

c. Operation of Preference Rules under the Bonneville Project Act

Prior to the Regional Act, BPA power was sold under the Project Act. Section 5(a) of the Project Act, 16 U.S.C. § 832d(a), authorizes BPA to sell power to all requesting customers, but requires BPA to include in all contracts certain provisions for the benefit of public bodies and cooperatives.[31] Section 4 of the Project Act requires BPA to give priority to public bodies and cooperatives when

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[30] *See, e.g.*, DEIS, *supra* n. 4, at IV-71 [JA 29]. This practice was quite limited until the early 1970s when utilities built the first coal and nuclear plants in the Northwest. Power "displaced" from these plants is sold to Southwest utilities, who save oil and gas by shutting down their generators when nonfirm power is available from the Northwest. *See, e.g.*, EIS, *supra* n. 12, at IV-71 to IV-73.

[31] For example, BPA contracts must be limited to 20 years' duration and BPA must retain the right to cancel contracts with private utilities (although not the DSIs) on five years' notice.

power is insufficient to satisfy the competing demands of both public and private customers:

> [I]n the event that . . . there shall be conflicting or competing applications for an allocation of electric energy between any public body or cooperative on the one hand and a private agency of any character on the other, the application of such public body or cooperative shall be granted.

16 U.S.C. § 832c(b).

Two aspects of the Project Act's preference rules bear upon analysis of this case. First, while limiting BPA's ability to execute new contracts during periods of power shortage, those rules did not derogate BPA's obligation to perform in accordance with contracts already executed. Section 5(a) of the Project Act expressly provides:

> Contracts entered into under this subsection shall be binding in accordance with the terms thereof and shall be effective for such period or periods, including renewals or extensions, as may be provided therein. . . .

16 U.S.C. § 832d(a).

Thus, preference rules only governed BPA's allocation of power not otherwise lawfully committed by contract; while BPA was required to offer uncommitted power to preference utilities and to deny new contracts to nonpreference customers if power shortages arose, preference rules neither required nor permitted BPA to breach existing contracts by failing to deliver power committed thereunder.[32]

Second, even prior to the Regional Act BPA operated under laws that granted certain BPA nonpreference customers priority to power over certain BPA preference customers. Congress enacted these laws precisely to ensure

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[32]Thus, as Congress noted, the DSIs' pre-Regional Act contracts would have remained binding until they expired. *See House Interior Report*, at 28-29 [Cert. A., at E-70 to E-72].

a different distribution of BPA power than would have obtained under the Project Act's preference rules alone.[33]

4. The Regional Act: Purpose and Structure

The Regional Act became law on December 5, 1980, following four years of legislative effort. Its provisions committing power to individual preference and nonpreference customers represent a "regionally-negotiated 'peace' settlement"[34] designed to address three critical problems:[35]

(i) BPA's statutory inability to augment existing power supplies;

(ii) BPA's inability under the Project Act's preference rules to offer new contracts to nonpreference utility and industrial customers, resulting in the denial

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[33]For example, since 1964 BPA has been prohibited from selling to preference customers in the Southwest power for which there is demand by Northwest customers (including nonpreference customers). 16 U.S.C. §§ 837-837h. *See, e.g.*, 112 CONG. REC. S25,779 (1966) (remarks of Sen. Mansfield) ("Public law 88-552 was designed to prevent this type customer [i.e., a preference customer] in one region from having a preference over the nonpreference users in the area where the power was to be generated —in those instances where there was a demand by the nonpreference users in the area of origin.") Since 1944 BPA has been obligated to observe a "geographical preference" for Montana customers (including nonpreference customers) in the sale of power from Hungry Horse Dam. 43 U.S.C. § 593a; this was reaffirmed in Pub. L. 88-552, 16 U.S.C. § 837h, and in the Regional Act, 16 U.S.C. § 839g(f).

More generally, preference rules simply do not affect rights to power that are determined by statute. See p. 41 *infra*. *Compare* Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes*, 9 ENVTL. L. 601 (1979); (discussing preference rules but not statutory commitments to nonpreference customers) *with* Redman, *Preference and Other Clauses in Federal Power Marketing Acts*, 13 ENTVL. L. 773 (1983) (discussing preference rules in light of statutory commitments of power to nonpreference customers).

[34]126 CONG. REC. H9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley) [Cert. A., at G-3].

[35]*House Commerce Report*, at 27-28 [Cert. A., at D-66 to D-68].

of low cost federal power to many regional consumers and threatening to deny BPA significant operating efficiencies and additional revenues; and

(iii) the prospect of protracted litigation over BPA's administrative allocation of federal power.

The Regional Act overcomes these problems by legislating power entitlements for all preference and nonpreference customers—thereby eliminating the need for an administrative allocation of this power in accordance with preference rules—and by granting BPA authority to acquire the power necessary to meet these statutory obligations.

Under the Regional Act, BPA is required to offer initial long-term contracts to all customers: preference utilities, private utilities, federal agencies, and existing DSIs.[36] Subsequent contracts with each of these customers are authorized but not required.[37] While reaffirming the Project Act's preference provisions,[38] Congress simultaneously "deemed" the initial mandated contracts to be supported by a sufficiency of power, thereby using a legal fiction to clarify that these initial contracts are immune from preference challenge.[39] By statutorily committing power

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[36]16 U.S.C. § 839c(g)(1). Congress consistently described these initial contracts as "required". *See, e.g., House Interior Report,* at 32, 34, 48 [Cert. A., at E-78 to E-79, E-81, E-106]; *House Commerce Report,* at 27-28, 34, 64 [Cert. A., at D-66 to D-67, D-76, D-126 to D-127]; *Senate Report,* at 33 [Cert. A, at F-66 to F-67].

[37]*See, e.g.,* 16 U.S.C. § 839c(d)(1)(A) (permanent authorization for BPA to serve existing DSIs); *see also House Commerce Report,* at 61 [Cert. A., at D-122] ("Subsequent contracts with these DSIs are authorized but not mandated."). Subsequent contracts would be governed by Regional Act provisions other than those that apply only to the initial contracts.

[38]16 U.S.C. § 839c(a). *See* pp. 26, 34, 41 *infra.*

[39]16 U.S.C. 839c(g)(7). *See* pp. 27, 35 *infra.* This section was added at the same time as the Regional Act's preference provisions, *see generally Senate Report,* at 5 [§ 5(c)(1)] [Cert. A., at F-11 to F-12], 12 [§ 9(c)(2)] [Cert. A., at F-27 to F-28], expressly "to ensure that a challenge . . . [on preference clause grounds] to the

under initial mandated contracts rather than leaving BPA to allocate this power administratively in accordance with preference rules, Congress intended to provide a period of regional peace during which BPA could utilize its new authority to acquire power sufficient to meet the needs of all customers.[40]

Congress specified each customer's statutory power entitlements under these initial mandated contracts. For preference utilities, private utilities, and federal agencies, the contracts are to provide power sufficient to meet the customer's net firm power loads.[41] The DSI contracts are to provide each DSI with the same "amount of power" specified in its 1975 contract,[42] and are to provide BPA with power "reserves" to protect its "firm power loads."[43] Such reserves are to be provided through "specific contract provisions" permitting BPA "to interrupt, curtail, or otherwise withdraw . . . portions of" the DSI power when "needed to avert particular planning or operating shortages for the benefit of firm power customers of the Administrator."[44]

All utilities may also offer to sell BPA, at their "average system cost" of resources, amounts of power not to exceed their residential and farm consumer loads, and are entitled to receive in exchange equal amounts of BPA power at the lowest rate BPA offers to preference customers.[45] This

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initial contracts required to be offered under this Act will not be sustained." *House Commerce Report*, at 64 [Cert. A., at D-126 to D-127]. *See also, id.* at 37 [Cert. A., at D-81 to D-83].

[40]*See House Commerce Report*, at 37 [Cert. A., at D-81 to D-83].

[41]16 U.S.C. §§ 839c(b)(1), (3). Utilities that own generating resources must use their power to supply their own loads; BPA is required to supply these utilities only the net additional power needed to serve their firm loads. *House Interior Report*, at 33-34 [Cert. A., at E-80 to E-81]; *House Commerce Report*, at 59 [Cert. A., at D-119]; *See also* Mellem, *supra* n. 13, at 249-50, 255-57.

[42]16 U.S.C. § 839c(d)(1)(B). *See* pp. 24-25 and 28 n. 86 *infra*.

[43]16 U.S.C. § 839c(d)(1)(A). *See* pp. 25-26 and 28 *infra*.

[44]16 U.S.C. § 839a(17).

[45]16 U.S.C. § 839c(c).

residential power "exchange" program provides rate relief for residential and farm consumers purchasing power from nonpreference utilities and thus cures a major part of the power allocation problem that prompted passage of the Regional Act.[46] Exchanging utilities are required to pass savings through to their consumers in the form of lower rates.[47] The costs to BPA of this exchange program are to be recovered in large part through higher rates charged to the DSIs.[48]

Power that remains *after* BPA has satisfied its obligations to all customers under the mandated contracts may be sold as "surplus," to which preference utilities have priority under the preference rules of the Project Act.[49]

5. The Proceedings Below

The Regional Act required BPA to offer initial contracts to all customers within nine months of its effective date.[50] BPA published procedures for and conducted contract negotiations,[51] and thereafter timely offered these initial con-

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[46]*See House Interior Report*, at 35 [Cert. A., at E-82 to E-83]. This "exchange" program was designed for nonpreference utilities not otherwise eligible to buy power at BPA's preference customer rates. *See id.; House Commerce Report*, at 60 [Cert. A., at D-120 to D-121].

[47]16 U.S.C. § 839c(c)(3).

[48]16 U.S.C. § 839e(c)(1). *See* p. 47 n. 119 *infra*. *See, e.g., House Interior Report*, at 35 [Cert. A., at E-82 to E-83]; *House Commerce Report*, at 29 [Cert. A., at D-69]; Kazen Letter, VIII COR 2335 [Cert. A., at I-2 to I-3].

[49]16 U.S.C. § 839c(f). *See* pp. 27, 29 *infra*. The remaining sections of the Regional Act constrain BPA's exercise of its new power purchase and conservation authority. *See generally*, Mellem, *supra* n. 13, at 246-47.

[50]16 U.S.C. § 839c(g)(1).

[51]46 Fed. Reg. 44,340 (Sept. 3, 1981), IX COR 2355-59 [JA 81]; 46 Fed. Reg. 18,331 (Mar. 25, 1981), V COR 1097-99. Respondents argued below that BPA failed to follow its pre-Regional Act procedures regarding changes in its power marketing policies, *see* p. 50 n. 123 *infra*, not that BPA failed to adhere to the procedures it adopted for negotiating the Regional Act contracts.

tracts to all utility, federal agency, and DSI customers on August 28, 1981.[52]

On August 31, 1981, Respondent preference utilities filed an action in the Ninth Circuit challenging the lawfulness of numerous provisions of the DSI contracts.[53] The Ninth Circuit denied Respondents' motion for a stay, but granted the request of BPA and the DSIs for expedited consideration.[54] Thereafter, Respondents narrowed their challenge to Section 7(c) and three related provisions of the DSI contracts governing BPA's right to restrict first quartile power.[55]

On April 6, 1982, the Ninth Circuit issued its decision in favor of Respondents preference utilities, holding that the disputed contract provisions violate the Regional Act's preference rules by limiting BPA's rights to restrict delivery of nonfirm power to the DSIs' first quartile, thus denying Respondents priority to this nonfirm power.[56] This Opinion neither analyzes nor even mentions those provisions of the Regional Act that direct BPA to supply the DSIs with a specified "amount of power," protect that power from preference challenge, and prohibit BPA from

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[52]46 Fed. Reg. 44,340 (Sept. 3, 1981), IX COR 2355 [JA 82]. The negotiations were open to the public. BPA also held hearings and published explanations for all proposed contract provisions. *Id.* [JA 84]. Preference utility arguments concerning the first quartile restriction rights here at issue were presented and rejected in the negotiation process and in the formal proceeding to determine BPA's rates. BPA, *Administrator's Record of Decision, 1981 Wholesale Power Rate Proposal* IV-14 to IV-16 (June 1981).

[53]*See* p. 25 n. 79 *infra*.

[54]Order dated September 11, 1981.

[55]Second Amended Complaint, dated October 29, 1981, at 6 [JA 22]; *see* p. 25 n. 79 *infra*.

[56]The Opinion declined to reach two issues raised by Respondents: that the disputed contract provisions provide the DSIs a greater "amount of power" than authorized under the Regional Act, and that they were adopted in violation of BPA's pre-Regional Act public comment procedures for administrative changes in power marketing policy. *Central Lincoln Peoples' Utility District v. Johnson*, 673 F.2d 1076, 1083 n. 9 [JA 53]. *See* p. 50 n. 123 *infra*.

selling nonfirm power to utilities as surplus until all BPA's contract obligations have been met.[57]

The DSIs and the United States sought rehearing and rehearing en banc. On September 7, 1982, the Ninth Circuit modified its Opinion, adding a new footnote 4.[58] It then denied rehearing and rehearing en banc[59] but granted the DSIs' motion to stay issuance of the mandate until 14 days after this Court's final disposition of the case.[60]

The DSIs filed their petition for certiorari in this Court on December 22, 1982. The United States filed a brief in support of the petition on February 4, 1983. Respondents preference utilities filed a brief in opposition to the petition on March 4, 1983. By this Court's Order of March 28, 1983, the petition for certiorari was granted.

SUMMARY OF ARGUMENT

Federal power is federal property that Congress may dispose of as it considers appropriate.[61] In the Regional Act, Congress committed power directly to individual customers by statute rather than leaving that power to be allocated administratively by BPA under the Project Act preference provisions. This case turns on a single issue of statutory construction: did Congress commit the disputed power to the DSIs, or intend this power to be uncommitted "surplus" available for administrative allocation in accordance with preference rules? Because the Ninth Circuit missed the fundamental distinction between a statutory commitment and an administrative allocation of power, it misunderstood the provisions of the Regional Act that

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[57] 16 U.S.C. §§ 839c(d)(1)(B), 839c(g)(7), 839c(f).

[58] Order Amending Opinion [JA 66].

[59] Order Denying Petition for Rehearing [JA 67].

[60] Order filed October 12, 1982. Pending this Court's final disposition of the case, however, BPA is operating its hydro system and delivering power in accordance with the Opinion. Respondents' Memorandum of Law 1-2, filed October 4, 1982.

[61] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330, 338 (1936). *Accord Alabama v. Texas*, 347 U.S. 272, 273 (1954).

commit this power to the DSIs and protect that commitment from preference challenge.

The DSIs' power commitment is bounded by four statutory requirements. First, BPA is required to offer initial contracts to all customers, including the DSIs and other nonpreference customers.[62] Second, BPA must make continuously available to each DSI the same "amount of power" specified in the 1975 contracts, except when BPA is authorized to restrict delivery of this power.[63] Third, BPA is authorized to restrict the DSIs' first quartile power to protect BPA's firm loads from shortages, but not for other purposes.[64] Fourth, BPA must meet its contract obligations to the DSIs and all other customers before offering any power for sale as surplus in accordance with preference rules.[65]

The DSIs' power commitment reflected in their new contracts is precisely that which Congress prescribed in the Regional Act; BPA is obligated to make continuously available to each DSI the same amount of power specified in the 1975 contracts, and is entitled to restrict the first quartile of that power in order to protect its firm loads. The operative language of the challenged contract provisions was drafted by BPA prior to passage of the Regional Act, shared with Congress through years of legislative consideration, required by the statute, and endorsed in the legislative history.[66] All three Congressional committee reports confirm that Congress intended these contract provisions in order to maximize efficient operation of hydro system resources and make possible wholesale rate parity

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[62] 16 U.S.C. § 839c(g)(1).

[63] 16 U.S.C. § 839c(d)(1)(B).

[64] 16 U.S.C. §§ 839c(d)(1)(A), 839a(17).

[65] 16 U.S.C. § 839c(f).

[66] *See, e.g.*, Kazen Letter, *supra* n. 19, at Appendix III, VIII COR 2350 [Cert. A., at I-23]; Memorandum regarding "BPA Obligations With Respect To DSI Top Quartile" (Feb. 12, 1981), XXV COR 6748-50 [Cert. A., at K]; 16 U.S.C. §§ 839a(17), 839c(b)(1)(A); n. 67 *infra*.

for residential consumers through the Northwest.[67] BPA's implementation of this statutory directive through contract provisions that use Congress's very language was reasonable under the relevant standard of review.[68]

Presuming that Congress did not intend a statutory commitment of power to nonpreference customers absent an "explicit exception" to preference,[69] the Ninth Circuit misconceived both the nature of the DSIs' power commitment and the function of preference rules under the Regional Act. All the power used to serve the DSIs' first quartile—whether firm or nonfirm—has been statutorily committed to the DSIs except when needed to protect BPA's firm loads from shortages.[70] By limiting to the protection of BPA's firm loads the purposes for which first quartile power may be restricted, Congress changed the DSI's power commitment from their 1975 contracts, under which first quartile power could be restricted "at any time."

Preference rules govern the administrative allocation of uncommitted power when that power is insufficient to satisfy the competing demands of preference and nonpreference customers, but do not determine rights to power that already has been lawfully committed.[71] Congress's

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[67] *House Interior Report*, at 48 [Cert. A., at E-106 to E-107]; *House Commerce Report*, at 52, 61-62 [Cert. A., at D-107, D-122 to D-123, D-135]; *Senate Report*, at 23, 27-28, 59-60, 69 [Cert. A., at F-47 to F-48, F-55 to F-56, F-74 to F-76, F-89].

[68] *See, e.g., American Paper Inst. v. American Electric Power Service Corp.*, ___ U.S. ___, 51 U.S.L.W. 4547, 4552 (May 17, 1983); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *CBS v. Federal Communications Comm'n*, 453 U.S. 367, 382 (1981).

[69] *See* p. 41 *infra*.

[70] 16 U.S.C. §§ 839c(d)(1)(A), 839a(17).

[71] *See, e.g.*, Sections 4(b) and 5(a) of the Project Act, 16 U.S.C. §§ 832c(b), 832d(a); *City of Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978); *Volunteer Electric Coop. v. Tennessee Valley Authority*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd*, 231 F.2d 446 (6th Cir. 1956); *Citizens Utilities Co. v. United States*, 149 F.

very purpose in committing power to nonpreference customers under initial mandated contracts was to achieve in the Regional Act a distribution of Northwest power that otherwise would have been precluded by existing preference rules.[72] When Congress adopted provisions reaffirming the preference rules of a prior law, it simultaneously adopted a provision "deeming" BPA to have sufficient power for all initial mandated contracts.[73] Congress's use of this legal fiction most powerfully demonstrates its intent to immunize the power committed under the initial contracts from preference claims,[74] yet the Ninth Circuit first ignored and then mischaracterized this important provision.[75]

By rejecting outright BPA's interpretation of technical statutory provisions, the Ninth Circuit has remade Congress's carefully integrated power allocation plan and significantly impaired BPA's ability to achieve the long-term regional benefits that plan was designed to achieve.

ARGUMENT

1. The Regional Act Expressly Commits the Disputed Power to the DSIs and Protects that Power From Preference Claims

a. Statutory Overview

The disputed DSI contract provisions follow directly from the Regional Act, which—

Supp. 158 (Ct. Cl.), *cert. denied*, 355 U.S. 892 (1957); *House Commerce Report*, at 27-28 [Cert. A., at D-66 to D-67].

[72]*See, e.g., House Commerce Report*, at 36-37, 64 [Cert. A., at D-80 to D-82, D-126 to D-127].

[73]16 U.S.C. § 839c(g)(7).

[74]*See, e.g., House Commerce Report*, at 36-37, 64 [Cert. A., at D-80 to D-82, D-126 to D-127].

[75]The Ninth Circuit's original Opinion failed even to discuss the "deemed" sufficiency provision. In amending its Opinion the Ninth Circuit summarily dismissed this provision without analyzing or even suggesting its statutory purpose [JA 66]. *See* p. 39 n. 110 *infra*.

(1) requires BPA to offer initial contracts to all preference and nonpreference customers, including the DSIs [16 U.S.C. § 839c(g)(1)];

(2) requires BPA to supply each DSI with a specified "amount of power" sufficient for its full load [16 U.S.C. § 839c(d)(1)(B)];

(3) authorizes BPA to restrict DSI power when needed to protect BPA's "firm loads" from shortages, but not for any other purpose [16 U.S.C. §§ 839c (d)(1)(A), 839a(17)]; and

(4) prohibits BPA from selling any power—firm or nonfirm—until all obligations under the initial mandated contracts have been met [16 U.S.C. § 839c(f)].

The Regional Act reaffirms the Project Act's preference provisions to guide BPA's allocation of all power not committed under the initial mandated contracts [16 U.S.C. § 839c(a)], but protects those contracts from challenge on preference grounds [16 U.S.C. § 839c(g)(7)].

b. Congress Committed to the DSIs a Specified "Amount of Power" Subject to Restriction for the Protection of BPA's "Firm Loads"

Under the Regional Act each DSI's power commitment has two components: power quantity and power quality. Power quantity is determined by the size of each DSI's load, as measured in kilowatts of contract demand. Power quality is determined by BPA's rights to interrupt delivery of power to portions of that load. All other BPA customers are committed power for their full loads without interruption; the character of the DSIs' power commitment is unique and follows from Congress's desire to secure important operating and revenue benefits by capitalizing on the ability of DSI loads to withstand interruptions.

Section 5(d)(1)(B) of the Regional Act governs DSI power quantity: it requires BPA to provide each DSI the

same "amount of power" specified in its 1975 contract.[76] Under Section 4 ("Sale of Power and Amount Sold") of the 1975 contract BPA made "continuously available" to each DSI a specified "amount of power" measured in kilowatts, sufficient to serve that DSI's full load.[77] Accordingly, under Section 5 ("Amount of Power") of the new contract BPA makes "continuously available" to each DSI this same "amount of power" measured in kilowatts, sufficient to serve its full load.[78] This power quantity provision of the new contracts was not challenged.

Rather, Respondent preference utilities challenged power quality provisions of the new DSI contract that permit BPA to restrict first quartile power only to protect BPA's "firm power loads."[79] The new contract provisions change BPA's right under the 1975 contracts to restrict first quartile power "at any time" without limitation on the purposes of the restriction. This change in restriction rights is mandated by the plain language of the Regional Act: Sections 5(d)(1)(A) and 3(17) expressly require that power sales to the DSIs "provide a portion of the

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[76]16 U.S.C. § 839c(d)(1)(B).

[77]XXIII COR 6278 [Cert. A., at N-2].

[78]The 1975 contracts also provided each DSI additional amounts of power, called "technological allowances," for purposes other than plant expansion (*e.g.*, pollution control). Congress expressly intended that this practice be continued, and the amount of power granted the DSIs under their new contracts is the number of kilowatts to which they were entitled under their 1975 contracts plus any additional kilowatts for technological allowances granted since 1975. *Senate Report*, at 28 [Cert. A., at F-56]; *House Commerce Report*, at 63 [Cert. A., at D-125 to D-126]; Respondents' Memorandum in Opposition to Motion for Temporary Injunction or Stay Pending Review, filed September 9, 1981, Table I [JA 20].

[79]Respondents challenged four separate provisions of the new DSI contracts [Sections 7(c), 7(e)(6), 8(a)(2), and 8(c)(9)], all relating to and implementing this limitation on the purpose for which BPA can restrict first quartile power. XIV COR 3787 [Cert. A., at H-1]; XIV COR 3800, 3807, 3822 [JA 109-10]. *See* p. 28 *infra*.

Administrator's reserves for firm power loads in the region," through "specific contract provisions" permitting BPA to interrupt portions of the DSIs' power to protect BPA's "firm power customers" from "shortages."[50] The "specific contract provisions" at issue here squarely implement this statutory language.

c. The Regional Act's Preference Provisions Do Not Affect The DSIs' Power Commitment

The Regional Act structure confirms that the DSIs' statutory power commitment is not affected by the preference provisions retained in the Act.[51] First, Congress mandated initial contracts for all customers including the DSIs, thereby committing power by statute to nonpreference cus-

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[50]16 U.S.C. §§ 839c(d)(1)(A), 839a(17); X COR 2694-95 [JA 100-101].

[51]The preference provisions of the Project Act are reaffirmed in Section 5(a) of the Regional Act, 16 U.S.C. § 839c(a). Section 10(c) of the Regional Act, 16 U.S.C. § 839g(c), is a savings clause for the preference provisions of "other" federal power marketing laws. Section 10(c) was enacted to reassure preference customers in other regions who feared that the Regional Act—by mandating contracts for and committing power directly to nonpreference customers—would weaken their rights under federal power marketing statutes applicable to them. *See, e.g., House Commerce Report*, at 34 [Cert. A., at D-76 to D-78]. *Cf.* 126 CONG. REC. H10,676 (daily ed. Nov. 17, 1980) (remarks of Rep. Udall, a sponsor of the bill and chairman of the House Interior Committee through which it passed):

> When it came to our committee, I started out with some misgivings. People in my own home State and in the Southwest region felt that there might be precedents set here that would devalue the preference clause rights that some of us have in other areas. . . . The more I thought of it, the more I understood that one of the great strengths of this country is regionalism and local control of matters. . . . I think the thing to do is to give the Northwest area the authority they are seeking in this bill so that they can build an energy future.

tomers that BPA could not have allocated them given existing preference rules and power shortages.[52]

Second, Congress authorized BPA to sell as "surplus" power in accordance with preference rules only that power not needed to meet its contract obligations, including its obligations to the DSIs.[53] Since BPA is obligated to make continuously available to each DSI a specified "amount of power" subject to restriction only for the protection of firm loads, none of the power BPA uses to meet this obligation—whether firm or nonfirm—may be sold as "surplus."

Finally, Congress immunized all statutory power commitments from preference claims by "deeming" BPA to have power sufficient to support the initial mandated contracts.[54] Through this express legal fiction Congress eliminated the single basis for preference customer challenge: an insufficiency of power to enter into contracts with nonpreference customers.[55] The sole purpose of this provision was to protect the power committed under initial mandated contracts from preference attack—the very type of attack here presented.

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[52] 16 U.S.C. § 839c(g)(1) (all customers); 16 U.S.C. §§ 839c(g)(1)(D), 839c(d)(1)(B) (DSIs specifically). *See* p. 3 *supra*.

[53] 16 U.S.C. § 839c(f). This is the only statutory provision under which preference utilities purchase nonfirm power.

[54] 16 U.S.C. § 839c(g)(7).

[55] Once lawfully executed, BPA contracts become "binding in accordance with their terms" notwithstanding preference rules, and BPA is obligated to supply all the power committed thereunder. 16 U.S.C. § 832d(a). *See* p. 14 *supra*.

2. The Regional Act's Legislative History Confirms that the Challenged Contract Provisions Implement the DSIs' Statutory Power Commitment And are Fully Consistent with Preference Rules

a. Congress Expressly Endorsed the Challenged Contract Provisions

The disputed contract provisions govern DSI power quality by establishing BPA's rights to restrict first quartile power; these provisions are taken directly from the Regional Act and its legislative history.[86] Section 7(c)—the principal contract provision challenged here[87]—was expressly endorsed by Congress and conforms to the explanation of DSI service provided by BPA to Congress throughout the legislative process. This contract provision contains three elements (identified here by brackets):

> [1] Bonneville may restrict deliveries of Industrial Firm Power in amounts up to 25 percent of the Purchaser's Operating Demand, at any time and for any reason in order to protect Bonneville's ability to meet its Firm Obligations. . . .

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[86]The Congressional committee reports recognize that each DSI's entitlement has two components, power quantity and power quality. *See Senate Report*, at 28 [Cert. A., at F-56 to F-57] (quantity must be same "amount of power" as in 1975 contracts, whereas "power quality provided the direct-service industries is determined by the reserve obligations set forth in their contracts in order to protect service to firm loads of the Administrator"); *see also House Commerce Report*, at 29, 61-63 [Cert. A., at D-69, D-122 to D-126]. The committee reports also confirm BPA's interpretation that the "amount of power" committed to each DSI under the Regional Act should continue to be measured as a fixed number of kilowatts. *See, e.g., Senate Report*, at 66 [Cert. A., at F-86]; *House Commerce Report*, at 28-29 [Cert. A., at D-68 to D-69]. *See also Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395, 409-10 (1975) (Congressional use of phrase with long-standing administrative interpretation presumed to ratify that interpretation).

[87]*See* n. 79 *supra*; the three other challenged provisions each implement § 7(c).

> [2] Such restriction shall not be made for the purpose of selling nonfirm energy [to utilities]. . . .
>
> [3] Bonneville shall not be obligated to plan for or to acquire resources for the purpose of serving the Purchaser's First Quartile load, but Bonneville will treat the Purchaser's First Quartile as a firm load for purposes of resource operation, which firm load shall be subject to the restriction rights provided by this subsection.
>
> [Cert. A., at H-1].

The first element implements the Regional Act's requirement that DSI loads be restricted only to protect BPA's firm loads.[88] The Committee reports are also express on this point: all BPA rights to restrict DSI power, not just the first quartile restriction rights at issue here, are to be exercised only for the protection of BPA's firm loads and not for any other purpose.[89] The second element implements the Regional Act's requirement that no power, firm or nonfirm, be sold to any utility, preference or nonpreference, until all of BPA's contract obligations are first met.[90] The third element carries out Congress's intent—expressed throughout the Regional Act's legislative history—that BPA serve the DSIs' first quartile primarily with nonfirm power but treat that service as "firm" in order to provide DSI loads with the average power availability necessary to effectuate the Regional Act's rate provisions.[91]

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[88] 16 U.S.C. §§ 839c(d)(1)(A), 839a(17). *See* pp. 17, 25-26 *supra*.

[89] *House Interior Report*, at 48 [Cert. A., at E-106 to E-107]; *House Commerce Report*, at 61-63 [Cert. A., at D-122 to D-126]; *Senate Report*, at 23. ("It is not intended that the Administrator's [rights to restrict DSI power] will be used to protect other than firm loads."), 28 [Cert. A., at F-48, F-56].

[90] 16 U.S.C. § 839c(f). *See House Commerce Report*, at 63 [Cert. A., at D-126] ("Section 5(f) provides that power that is *not needed to meet BPA's obligations* under subsections (b), (c), and (d) is to be sold in accordance with this Act and existing law.") (emphasis added). *See also* p. 27 *supra*.

[91] *See* pp. 30-34 and 47 n. 120 *infra*.

The text of Section 7(c) is taken directly from the *House Interior Report*, at 48 [Cert. A., at E-106 to E-107] (emphasis added):

> Sales to existing DSIs are required under this subsection to continue to provide a portion of BPA's power system reserves. *The Committee understands and intends that . . . [a]pproximately 25 percent of the DSI load [the first quartile] is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads.* An additional 25 percent of the DSI load [the second quartile] will be treated as a firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.

This report language repeats *verbatim* and expressly endorses the interpretation of Regional Act requirements for DSI service provided by BPA at the Interior Committee's request.[92] This language was expressly affirmed as representing the Senate's intent as well,[93] and corresponds

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[92] *See* Kazen Letter, Appendix III, VIII COR 2350 [Cert. A., at I-23]. The Ninth Circuit overlooked the committee's statement that it "understands and intends" this service in finding BPA's interpretation not to have been ratified by Congress. 686 F.2d 715.

[93] 126 CONG. REC. S14,690-91 and S14,698 (daily ed. Nov. 19, 1980) (remarks of Sens. Jackson and McClure) [Cert. A., at J-1 to J-2]. Sens. Jackson and McClure were the chairman and ranking minority member of the Senate committee that acted on the bill, and each was also an original sponsor.

to the first quartile restriction rights described in the other committee reports.[94]

The legislative history thus demonstrates that Congress was informed of, understood, and intended BPA's plan to serve the first quartile (a) without interruption other than to protect BPA's firm loads, and (b) with power—both firm and nonfirm—that could be produced on BPA's existing system if that system were operated to treat the first quartile as a firm load. BPA would assure first quartile service to the extent its system could be operated to produce the necessary power, including nonfirm power.

The increased power production, sales, and revenues made possible by such service were efficiencies recognized as deriving solely from BPA's ability to mesh river operations with the interruptibility feature of DSI loads, and were relied upon throughout the legislative process to effectuate the Regional Act's complicated rate provisions. Thus, DSI service received extended treatment in BPA's successive analyses of the legislation's rate provisions, prepared for Congress and BPA's customers. The first of these analyses was written shortly after the legislation was first introduced in August 1978.[95]

> The greatest opportunity for a change in the prospective industrial firm sales is in operations affecting the predictable supply to the DSI load and in a corresponding increase in the reserves they provide. By treating the entire DSI load as a firm load, subject to interruption in favor of other firm loads in the region, the DSIs will receive service which is closer to full service under many more operating conditions than

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[94] *House Commerce Report*, at 52, 61-2 [Cert. A., at D-107, D-122 to D-124]; *Senate Report*, at 23, 28, 59 [Cert. A., at F-47 to F-48, F-56 to F-57, F-74].

[95] The bill (S.885) that became the Act in the 96th Congress was first introduced in the 95th Congress. *See* 125 CONG. REC. S3997 (daily ed. April 5, 1979) (remarks of Sen. Jackson).

> they do at present. The DSI load is uniquely able to be considered in this fashion because they can borrow on the expectation of better than critical streamflows or resource production, yet stand ready to curtail their loads beyond the normal reserve requirement in order to protect continued service to regional firm loads. The expected increase in industrial firm supply on a long-term average is from a present 75% industrial firm with 14% additional nonfirm sales to nearly 96% industrial firm service.[96]

A year later, the Senate committee report incorporated BPA's final analysis of rate directives:

> 3. Direct-Service Industry
>
> a. *Rate Availability.* This rate applies to all "Industrial Firm" sales to BPA's direct-service industries which provide planning and operating reserves. The quantity of [DSI] power for rate purposes is based on the proportion of the total industrial requirement, on a long-term average (currently estimated to be between 85 percent and 96 percent of the total DSI load), that BPA projects it will be able to serve directly. This projected availability is predicated on the continued planning and development of "firm" resources under critical stream-flow conditions to carry 75 percent of the total DSI requirements. The balance would be served with resources which are in excess of critical planning amounts [nonfirm and "borrowed" firm power] but operated to meet the entire DSI load as if it were firm.[97]

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[96]Memorandum regarding "BPA Obligations With Respect To DSI Top Quartile," (Feb. 12, 1981), XXV COR 6750 [Cert. A., at K-3] (excerpting 1978 and 1979 "Analysis of Rate Directives").

[97]*Senate Report*, at 59 [Cert. A., at F-74].

These passages demonstrate that BPA consistently[98] represented to Congress its intention to treat the DSI first quartile as a firm load for operating purposes subject to interruption only for the protection of firm loads,[99] and

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[98]BPA's contemporaneous construction remained consistent after passage of the Regional Act. *See, e.g.*, DSI-BPA Meeting, Remarks of Earl Gjelde, Dec. 11, 1980, 1 COR 254-62 (BPA's interpretation of Act's requirements for first quartile service six days after the Act became law). In its first rate decision under the Regional Act, published several months before the contracts at issue here were offered and accepted, BPA also adhered to this plan for DSI service:

> 6. *Firmness of Top Quartile*
>
> Service to the DSI's [sic] under the Regional Act is for power subject to limited interruption for service to the Administrator's other firm loads. As part of this service BPA is to plan and acquire sufficient firm resources to satisfy three quarters of the DSI load. The remaining one quarter is commonly referred to as the DSI "Top Quartile." This top quartile is to be treated as a firm load for operating purposes only. . . .
>
> • • • •
>
> The Regional Act establishes the quasi-firm status of the DSI top quartile. Sales to the DSI's [sic] by virtue of Section 5(d)(1)(A) are to "provide a portion of the Administrator's reserves for firm power loads." The Regional Act defines reserves as the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers. Service to the top quartile cannot be restricted to provide service to nonfirm loads or to make sales of nonfirm energy. I view the top quartile as providing a reserve for the Administrator's firm load obligations. Therefore, I have determined that the proposed utilization of energy above critical streamflows to serve the top quartile before marketing as nonfirm does not violate any preference or priority provisions awarded the public bodies and cooperatives, but rather is service mandated by the Regional Act and its legislative history. . . .

BPA, *Administrator's Record of Decision, 1981 Wholesale Power Rate Proposal* IV-14 to IV-16 (June 1981).

[99]Section 7(d) ("Second Quartile Restriction Rights") of the new DSI contracts reduces the quality of DSI second quartile power by increasing the number of circumstances in which second quartile

that Congress expressly adopted this plan to assure the DSIs an increased average power availability (96%) that would effectuate the Regional Act's rate provisions.[100]

b. Congress Did Not Intend Preference Rules to Affect the DSIs' Statutory Power Commitment

Congress was aware that absent the Regional Act, all BPA power would have been allocated administratively in accordance with preference.[101] This was precisely the problem Congress sought to cure.[102] Congress required initial contracts for BPA's nonpreference customers, thereby creating statutory entitlements to power for those customers. Having committed power by statute to nonpreference customers under initial mandated contracts and having preserved preference to govern BPA's allocation of uncommitted power, Congress saw "no inconsistency between the provisions and intent of this Act and the

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power can be interrupted. *See* Respondents' Memorandum in Opposition to Motion for Temporary Injunction or Stay Pending Review, filed Sept. 9, 1981, page 20 [Table II] [JA 21]; Affidavit of Bruce E. Mizer at 7-8, dated Sept. 8, 1981, filed with Reply Memorandum of Direct Service Industries; § 7(d) of 1981 contracts [Cert. A., at H-1 to H-9]. These new second quartile restriction rights are also taken from the House Interior Committee's report language set forth above.

Given lower power quality for the second quartile the Regional Act's treatment of the first quartile as a firm load subject to interruption only for protection of BPA's other firm loads was particularly important to the DSIs in accepting new contracts. *See Pacific Northwest Electric Power Issues: Hearings Before Subcomm. on Energy and Power of the Comm. on Interstate and Foreign Commerce, House of Representatives, on H.R. 13931*, 95th Cong., 2d Sess. 1022-1035 (1978) (statement of Jack Speer, Anaconda Company) [Cert. A., at 0-4]; Mizer Affidavit, *supra*, at 7-8.

[100] *See* p. 47 *infra*.

[101] *See, e.g., House Commerce Report*, at 27-28, 36-37 [Cert. A., at D-66 to D-67, D-80 to D-82].

[102] *See* pp. 4-5 *supra*.

existing preference clause of the Bonneville Project Act . . . . This Act and the preference clause are expected to operate in a mutually compatible manner."[102]

The Regional Act's legislative history emphasizes that Congress did not reaffirm preference only to abort the nonpreference customer power commitments made possible by the Regional Act.[104] To preclude any such result, Congress added a provision "deeming" BPA to have sufficient power to support the initial mandated contracts at the same time that it reaffirmed preference.[105] Congress's purpose in enacting this legal fiction was made clear: it was "intended to

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[103]*Senate Report*, at 26 [Cert. A., at F-53]. Because preserving preference is consistent with committing power by statute to nonpreference customers, *see* p. 41 *infra*, Congress could and did describe both as virtues of the Regional Act. *See, e.g., House Commerce Report* at 33-35 [Cert. A., at D-76 to D-78] (preference); *id.* at 27-28 [Cert. A., at D-66 to D-68] (required contracts for nonpreference customers); 125 CONG. REC. S3998 (daily ed. Apr. 5, 1979) (remarks of Sen. Jackson) (introducing the bill, promising amendments to protect preference, and explaining that the legislation will "eliminate the need" for BPA allocation by permitting BPA to contract with nonpreference customers).

[104]The Regional Act protects preference utilities by limiting BPA's authority to restrict its firm power sales obligations to them, 16 U.S.C. §§ 839c(b)(6), 839c(g)(6), and through a special firm power rate "ceiling", 16 U.S.C. §§ 839e(b)(2), 839e(b)(3). *See House Commerce Report*, at 33-34 [Cert. A., at D-76 to D-77]; *House Interior Report*, at 33-34 [Cert. A., at E-80 to E-82]; *see also* 125 CONG. REC. S3999 (daily ed. Apr. 5, 1979) (remarks of Sen. Jackson). *See generally, Mellem, supra*, n. 13, at 276-78. Reaffirmation of preference was intended to protect preference utility "contract requirements" by assuring these utilities priority to contract renewals after expiration of the initial contracts if BPA lacked sufficient power for all customers. *See House Commerce Report*, at 34 [Cert. A., at D-77]; *House Interior Report*, at 34 [Cert. A., at E-82]. The "contract requirements" of preference utilities do not include nonfirm power, but rather power for each utility's net "firm power load." 16 U.S.C. § 839c(b)(1).

[105]16 U.S.C. § 839c(g)(7). *See* p. 16 *supra*.

ensure that a challenge [on preference grounds] to the initial contracts required to be offered under this Act *will not be sustained." House Commerce Report,* at 64 (emphasis added) [Cert. A., at D-126 to D-127]. As stated by Rep. Foley, a leading sponsor:

> It is said that this bill will not prevent litigation. That is certainly true. . . . [T]he key point is that litigation under this bill will not include litigation to determine the validity of each entity's new power supply contract.
>
> On the contrary, by stating that BPA shall be "deemed" to have sufficient power to enter into all the 20-year power sales contracts mandated by the legislation, the bill specifically ensures that these new contracts will be valid against legal challenge. This provision does not "guarantee" actual power deliveries in day-to-day operation, but it does guarantee that whatever litigation occurs on power matters will not be litigation going to the heart of any BPA customer's power sales contract and power allocation—the most important single result of this legislation.

126 CONG. REC. H10,678 (daily ed. Nov. 17, 1980) [Cert. A., at L-2].[106]

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[106]BPA stated in offering the contracts here at issue:

> This contract is the initial contract that Bonneville is required to offer each Industrial Purchaser pursuant to sections 5(d)(1)(B) and 5(g) of the Regional Act. As you know, the Act contemplates in section 5(d)(1)[A] additional, future contracts with each existing Industrial Purchaser, but unlike this initial contract, such future contracts do not have the benefit of the statutorily deemed sufficiency of power available to the Administrator under section 5(g)(7). Bonneville's ability to offer any future contracts to its nonpreference customers, including the Industrial Purchasers, is therefore largely dependent upon Bonneville achieving firm load/resource balance while these initial contracts are in effect.

Cover Letter by BPA Administrator Offering New DSI Contract (Aug. 27, 1981) [Cert. A., at M-1 to M-2].

3. The Ninth Circuit Misconceived the DSIs' Statutory Power Commitment and the Role of Preference Rules under the Regional Act

a. The Opinion Fails to Examine the DSIs' Power Commitment and Incorrectly Assumes the Disputed Power is Subject to Allocation by BPA

The Regional Act commits to the DSIs a specified amount of power, subject to restriction for the protection of BPA's firm loads. This statutory commitment has both a power quantity and power quality component, and is expressly immunized from preference challenge.[107] In declaring "unreasonable" BPA's interpretation of the statutory provisions establishing this commitment, the Ninth Circuit first failed to treat—and then entirely misconstrued—the provisions upon which that interpretation was based. As a result, the Opinion never adequately addresses the fundamental legal issue: whether Congress statutorily committed the disputed power to the DSIs, and thereby immunized this power from preference claims.

In its original Opinion, the Ninth Circuit acknowledged that the Regional Act limits to the protection of BPA's firm loads the purposes for which DSI power may be restricted, but concluded that the disputed contract provisions violate preference because the power at issue could never have been "allocated" to the DSIs in the first instance, given preference customer demand. The Ninth Circuit stated:

> No customer has an expectation of receiving any nonfirm power until BPA allocates it.

686 F.2d at 712.

This is an assumption, not a determination; it is flatly wrong and begs the relevant question. Nonfirm power committed to customers by statute is not subject to administrative allocation. The nonfirm power here in dispute is

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[107] *See* pp. 23-26, 28-36 *supra*.

used by BPA in meeting its obligations to the DSIs under initial contracts mandated by the Regional Act. Thus, this power has been statutorily committed and is not subject to administrative allocation.

BPA's use of nonfirm power to serve a portion of the DSIs' load achieves the operating and revenue benefits intended by Congress, but neither diminishes the DSIs' "amount of power" nor enlarges BPA's restriction rights under the Regional Act.[108] The Ninth Circuit's original Opinion fails even to cite the Regional Act's "amount of power" provision—the power quantity component of the DSIs' commitment[109]—and thus that Opinion never determines what power is statutorily committed to the DSIs; it simply assumes that the disputed power is uncommitted power subject to administrative allocation. *Id.* at 712, 715. Confronted in the petitions for rehearing with this significant omission, the Ninth Circuit modified its original Opinion by noting:

> Section 5(d)(1)(B) expressly links the DSIs' present allocation to their entitlement under the 1975 contracts.

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[108] 16 U.S.C. § 839c(d)(1)(B). In fact, the first use of nonfirm power is to meet BPA's contract obligations, EIS, *supra* n. 12, at IV-71, and no BPA power—firm or nonfirm—is available for sale as surplus in accordance with preference rules until all of BPA's contract obligations have been met. 16 U.S.C. § 839c(f). Conceptually, to commit nonfirm power by contract is no different from committing firm power by contract: both such commitments are made in advance of actual power production and depend on unpredictable streamflow levels. Indeed, the production of firm power is further contingent on the actual operation of non-hydro resources such as coal and nuclear plants. The nonpreference customer contracts at issue in *Volunteer*, 139 F. Supp. at 26, *Municipal Electric Utils. Ass'n v. Power Auth. of New York*, Docket No. EL78-24-001, Opinion No. 151, 21 FERC ¶ 61,021 (1982), and *Arkansas Power & Light Co. v. Schlesinger*, No. 79-1263 (D.D.C. 1980) (copy of Opinion lodged with this Court), each committed nonfirm power to the purchaser in advance of production.

[109] 16 U.S.C. § 839c(d)(1)(B). *See* pp. 24-26 *supra*.

> It is undisputed that under the 1975 contracts the DSIs received nonfirm power only after the preference customers filled their nonfirm needs.

686 F.2d 708, 712 n.4.

Both assertions are incorrect, and reflect the Ninth Circuit's confusion regarding the DSIs' statutory commitment. Section 5(d)(1)(B) does not link the DSIs' new "allocation" to their "entitlement" under the 1975 contracts; rather, it links only the "amount of power"—the DSIs' power quantity—provided under the two contracts. The power quality component of the DSIs' commitment is determined by BPA's rights to restrict this power, and in the Regional Act is changed by Section 5(d)(1)(A). Under the 1975 contracts preference utilities obtained the first quartile power here in dispute only through BPA's exercise of contract rights to restrict this power "at any time." Under Section 5(d)(1)(A) of the Regional Act, BPA now is permitted to restrict first quartile power only for the protection of its firm loads, and not for the purpose of making nonfirm power available to utilities. Because the Ninth Circuit failed to understand that it was only through the exercise of BPA's restriction rights that preference utilities secured this power under the 1975 contracts, the court failed to recognize that by limiting BPA's restriction rights Congress has now committed this power to the DSIs.[110]

Thus, the Court's conclusion that "nonfirm power is no less subject to the preference than firm power," 686 F.2d

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[110] *See* pp. 23, 34 *supra*. The original Opinion also failed to treat the "deemed" sufficiency provision. In the September 7 modification the Court stated that this provision "does not grant the DSIs any greater entitlement than what they received under the 1975 contracts." 686 F.2d at 712 n.4. This only further demonstrates the Ninth Circuit's confusion regarding the DSIs' statutory commitment; by "deeming" the initial mandated contracts to be supported with a sufficiency of power, Congress was concerned with protecting—not creating—statutory power commitments.

at 712, is wholly irrelevant. Preference rules govern BPA's allocation of *all* power—firm and nonfirm—that has not been committed by Congress. By failing properly to examine the provisions of the Regional Act upon which the DSIs' commitment is based, the Court assumed that the nonfirm power here disputed is available for administrative allocation in accordance with preference.[111]

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[111]The Ninth Circuit rejected as "ambiguous" the Senate Report language that supports BPA's interpretation of Regional Act requirements for DSI service:

> [T]he reference to "treating the DSI load as firm in the operation" [sic] is ambiguous because the first quartile cannot be treated as firm entirely. Unlike firm power, it is interruptible and subject to priorities.

686 F.2d at 713 n.6.

Had the Ninth Circuit better understood BPA's hydro system and the design for DSI service mandated in the Regional Act, it would have understood that the referenced language—which recurs throughout the legislative history—is entirely unambiguous. BPA will operate its system in the manner most likely to produce sufficient power, including nonfirm power, to serve the DSIs' first quartile. Indeed, the Senate Report's reference to resources "in excess of critical planing amounts" by definition assumes service with nonfirm power. To treat the first quartile as "firm for purposes of resource operation" means that BPA need not plan firm resources for such service, because unlike the remainder of the DSI load the first quartile is not "a firm load for *both* planning and operation purposes." *House Interior Report*, at 48 [Cert. A., at E-106 to E-107] (emphasis added). The fact that the first quartile is "interruptible" does not prevent its treatment as "firm" for purposes of resource operation; the remainder of the DSI load is "firm" for both operating *and* planning purposes but is "interruptible" under specific circumstances to protect BPA's firm service to its utility customers. *See, e.g., id.*

b. Preference Does Not Affect Power Committed by Statute and Congress Need Not Declare an "Explicit Exception" to Preference in Committing Power to Nonpreference Customers

Although the Regional Act assures power for nonpreference customers through an integrated program of statutory commitments, the Ninth Circuit refused to recognize the DSIs' power commitment absent an "explicit exception" to preference, 686 F.2d at 709, and concluded that "the purposes of the Act and its preference clause are best served by an interpretation that ensures the sale of power to preference customers." *Id.* at 715. The Opinion indicates a fundamental misconception regarding the function of preference rules. Preference is simply a statutory mechanism used to govern the administrative allocation of uncommitted power during periods of insufficiency; it constrains an agency's—but not Congress's—disposition of power. By requiring Congress to fashion an "explicit exception" to preference in order to commit power to nonpreference customers, the Opinion improperly burdens Congress's plenary authority to dispose of federal property and elevates preference to quasi-Constitutional status.

The list of power marketing laws in which Congress has included preference rules while directing that power be supplied to nonpreference customers is long. None of these laws contains an "explicit exception" to preference[112] and

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[112]In addition to the Boulder Canyon Project Act, 43 U.S.C. §§ 617-618, and the Tennessee Valley Authority Act, 16 U.S.C. §§ 831-831dd, discussed in text, *infra*, none of the following power marketing laws contains an "explicit exception" to preference:

a. The "Regional Preference Act" of 1964 (also known as Pub. L. No. 88-552), 16 U.S.C. §§ 837-837h, requires BPA to sell hydro power to Northwest customers including nonpreference customers before selling it to Southwest preference customers. *See also* 16 U.S.C. § 839f(c) (extended to all power).

b. The Hungry Horse Dam Act of 1944, 43 U.S.C. § 593a, requires sale of project power to Montana customers including nonpreference customers before sale to preference customers

no such exception is necessary because preference rules simply do not affect power that has been lawfully committed. Indeed, the very reason Congress commits power to particular customers by statute is that it intends a distribution of federal power that could not be achieved by preference rules alone; allocation of power by preference is the perceived problem, not the intended solution.

No court has previously required that Congress provide an "explicit exception" to preference in order to assure the sale of power to nonpreference customers. For example, without creating an "explicit exception" to the preference clause contained in Section 5(c) of the Boulder Canyon Project Act, 43 U.S.C. § 617(c), Congress in Section 5(b) of that Act, 43 U.S.C. § 617(b), required that contract renewals be granted to all initially contracting utilities, preference and nonpreference alike. When two nonpreference utilities were denied contract renewals and the power was sold instead to other utilities, including preference utilities, the court held that the nonpreference

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in other states. Congress has reaffirmed and extended this requirement. 16 U.S.C. § 837h; 16 U.S.C. § 839g(f).

c. The Atomic Energy Commission Act of 1954, 42 U.S.C. § 2064, requires that preference be given to "privately owned utilities" providing service to rural areas as well as to public bodies and cooperatives.

d. The Niagara Redevelopment Act of 1957, 16 U.S.C. §§ 836-836a, divides all power equally between preference and nonpreference customers, and commits 445,000 kilowatts of the nonpreference power to a particular private utility for resale to specific electroprocess industries. 16 U.S.C. § 836(b)(3). *See Municipal Electric*, 21 FERC at ¶¶ 61,109, 61,128.

e. The Atomic Energy Commission Appropriations Act, Pub. L. No. 87-701, § 112(e), 76 Stat. 604 (1962), [Cert. A., at Q] requires that power from steam at the Hanford Reactor be divided equally between public and private buyers.

utilities' "statutory rights" had been violated. *Citizens Utilities*, 149 F.Supp. at 160-63.[113]

More strikingly, the court in *Volunteer*, 139 F.Supp. at 22, upheld against preference challenge the sale of power to a nonpreference industrial customer under the Tennessee Valley Authority Act ("TVA Act"), 16 U.S.C. §§ 831-831dd—a statute that contains no "explicit exception" to its preference provisions. In *Volunteer* a preference utility challenged TVA's sale of power to a nonpreference industrial customer, arguing that the TVA Act's preference clause (16 U.S.C. §§ 831i-831k) compelled TVA to allocate this power to plaintiff, who would then resell it to the same industry at retail rates. To determine Congress's intended distribution of power the court examined the TVA Act's structure and history, rather than focusing exclusively on preference rules:

> Granted the Act states preference shall be given to states, counties, municipalities, and cooperatives not organized for profit. However, the Act does not end there.

Volunteer, 139 F. Supp. at 26.

The court then noted that the TVA Act expressly contemplates direct sales to industries in order to assure high load factors, increased revenues, and reduced costs for consumers, and concluded in language applicable here:

> The provisions cited are not conflicting so as to vitiate the effectiveness of one as opposed to the other. In fact

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[113]Moreover, the nonpreference utilities ultimately were granted power from a different project, which also was subject to preference rules. *See Fort Mojave Indian Tribe v. United States*, No. 77-4790ALS, slip op. at 2-5 (C.D. Cal. 1978) (copy of Opinion lodged with this Court).

> they are in complete harmony. The policy voiced by the statute empowering defendant to sell direct to industry and pass on to members of the preferred classes the benefits derived thereby are [sic] salutary and in furtherance of the avowed intent of the preceding section. . . . The position sought by plaintiff would actually circumvent the true intent of Congress that the cost of power to domestic and rural users be kept at the lowest possible rates. Instead, the result would be the enrichment of a small class of distributors such as plaintiff.

Id.

This analysis stands in sharp contrast to the Ninth Circuit's view that Congress can effect sales to nonpreference customers only through "explicit exceptions" to preference. Both the Regional Act and the TVA Act provide for the sale of power to nonpreference industrial customers; indeed, the Regional Act mandates the sale of power to industries whereas the TVA Act merely authorizes such sales as a "secondary purpose." 16 U.S.C. § 831j. Neither Act "ends" with its preference clause. The Ninth Circuit's attempts to distinguish *Volunteer* are completely unavailing.[114]

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[114] *See* 686 F.2d at 715, n.9. The Ninth Circuit mistakenly relied upon its prior decision in *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978). That case arose under the Reclamation Project Act of 1939, 43 U.S.C. § 485h, a statute in which Congress made no provision for the sale of power to nonpreference customers but rather left all power to be allocated administratively in accordance with preference rules. Thus, *Santa Clara* cannot "contradict" *Volunteer*, and is wholly irrelevant in construing statutes such as the Regional Act that indisputably commit power to many types of nonpreference customers.

4. The Ninth Circuit's Misapplication of the Standard of Review has Impaired BPA's Ability to Obtain the Benefits of DSI Service Intended by Congress

The well-established standard of review applicable here is whether BPA reasonably interpreted the Regional Act.[11a] While purporting to apply this standard, the Ninth Circuit *sub silentio* subjected BPA's interpretation to heightened scrutiny by rejecting the explanation of technical statutory provisions for which there was acknowledged support in the legislative history and requiring that BPA's interpretation be supported by an "explicit exception" to preference. 686 F.2d at 709. Rather than demanding an "interpretation [of the Regional Act] that ensures the

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[11a] *See, e.g., American Paper*, 51 U.S.L.W. at 4552; *Federal Election Comm'n*, 454 U.S. at 39:

> [T]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the [agency's] construction was "sufficiently reasonable" to be accepted by a reviewing court. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 75 (1975); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978). To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *Ibid.*; *Udall v. Tallman*, 380 U.S., at 16; *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946).

An agency's interpretation of its own enabling statute is entitled to special deference, *see, e.g., CBS*, 453 U.S. at 382; *United States v. Rutherford*, 442 U.S. 544, 553 (1979), *cert. denied*, 449 U.S. 937 (1980), particularly when the law is new and the agency was directly involved in its development, *see, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982); *Howe v. Smith*, 452 U.S. 473, 485 (1981); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Zuber v. Allen*, 396 U.S. 168, 192 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. Int'l Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961).

sale of power to preference customers." *id.*, at 715, the Ninth Circuit should have inquired whether BPA reasonably interpreted the Regional Act to ensure the sale of power as Congress intended.

The deference normally accorded agencies in interpreting statutes they administer is particularly warranted here. For four years, BPA assisted Congress in drafting and interpreting the Regional Act, consulting on its numerous technical provisions, and preparing for contract offers subsequent to passage. This extraordinary contribution to a highly technical and complex statute was expressly acknowledged by Congress.[115] The contract provisions challenged here are designed to assist the optimum operation of BPA's hydro system, a matter in which BPA is the undisputed expert, and were taken directly from the Regional Act and Congressional committee reports. BPA supplied the text of these provisions to Congress during the legislative process, remained consistent in its interpretation of their meaning, and implemented them precisely as it had previously described.[116]

Congress and BPA spent years designing DSI service under the Regional Act to capitalize on unique features of the DSI loads and BPA's hydro system, and thereby to achieve specific operating efficiencies and increased revenues.[117] Under the Opinion, BPA will be forced to sell to a small sub-class of preference utilities power it had planned to use for DSI service, thereby jeopardizing

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[115] *See, e.g.*, 125 CONG. REC. S11,592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) [Cert. A., at C], 126 CONG. REC. H9848-49 (daily ed. Sept. 29, 1980) (remarks of Rep. Dingell) [Cert. A., at G-1 to G-2].

[116] *See* pp. 28-36 *supra*.

[117] *See id.* and pp. 7-13 *supra*; *see also* X COR 2695 [JA 101].

its ability to secure these benefits. The utilities will use this power to increase their sales to other utilities,[118] depriving BPA of the extra revenue it had anticipated receiving from the DSIs. The loss of this revenue directly impairs BPA's ability to effectuate one of the Regional Act's primary purposes: rate subsidies for residential and farm consumers of nonpreference utilities.[119] The Regional Act's complex and interconnected rate provisions depend upon BPA's ability to provide the DSIs' first quartile with a high average availability of power—the very level of service that the Ninth Circuit's Opinion denies. If the Opinion is allowed to stand, the Regional Act's rate provisions will not work and cannot achieve the purposes Congress intended.[120]

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[118]Respondents argued below that they may need BPA nonfirm power to prevent shortages if their own power plants fail to operate as planned. The Court should not be misled. BPA has never provided nor been obligated to provide "back-up" or reserve power for utility-owned resources except under the Pacific Northwest Coordination Agreement, which is not affected by the contract provisions challenged here. *See* Mizer Affidavit, *supra* n. 99, at 11-13. The Coordination Agreement defines the rights and obligations of all Northwest generating utilities, BPA, and other parties. That Agreement and the Regional Act obligate Respondents to maintain their own reserves for their own resources. *Id.*; 16 U.S.C. § 839c (b)(1). Respondents would be in breach of the Agreement if they failed to provide such reserves and relied instead on nonfirm power from BPA for protection. Mizer Affidavit, *supra* n. 99, at 12; Coordination Agreement §§ 8 and 12, XXIII COR 6224-26, 6241. *See also* DEIS, *supra* n. 4, at II-71 [Cert. A., at P] (as members of Northwest Power Pool, Respondents must maintain their own reserves for their own power plants).

[119]In the first year of the Regional Act, residential and farm consumers of nonpreference utilities received more than $216,000,000 in direct rate relief, almost all of it paid by the DSIs. BPA, *1982 Annual Report*, at 1.

[120]The Regional Act establishes a complex interrelationship between service to the DSI first quartile, the residential exchange program, and the rate directives through which BPA recovers the costs of that program. After July 1, 1985 the DSI rate will essen-

The Opinion also jeopardizes continued DSI operations in the Northwest. DSI rates have increased more than 700% since 1979, eliminating the original cost advantages of Northwest aluminum production. Now, under the Opinion, the DSIs also face significant power interruptions in excess of those authorized by the Regional Act—an unfavorable and costly quality of service compared with that available in other regions of the United States and abroad. As a result, continuation of the DSIs' Northwest operations may become uneconomical, forcing plant closures and triggering significant losses for BPA, the DSIs, and the regional economy.[121]

The immediate effect of the Ninth Circuit's decision will be to allow a small group of preference utilities which op-

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tially equal BPA's firm power rate to preference customers, plus a typical utility markup above resource costs, minus adjustments for the lower cost of serving this size and type of load and a credit for the value of DSI reserves. 16 U.S.C. § 839e(c)(2). This will allow BPA to pay a substantial portion of the additional costs of the exchange program through the "profit" gained by charging the high DSI rate for first quartile service while serving the first quartile with relatively low cost nonfirm and "borrowed" firm power. Any decline in service to the DSI first quartile reduces BPA's ability to secure this added revenue. Loss of this revenue could destroy one of the Regional Act's primary goals—wholesale rate parity for residential and farm consumers served by preference and nonpreference utilities—by triggering the preference customer "rate ceiling." 16 U.S.C. §§ 839e(b)(2), 839e(b)(3) (first sentence). The Ninth Circuit's Opinion upsets these complex and interdependent provisions by "interrupt[ing] the flow of nonfirm power to the DSIs." 686 F.2d at 712. *See also Senate Report*, at Appendix B [Cert. A., at F-74]; Kazen Letter, VIII COR 2335, [Cert. A., at I-2 to I-3].

[121] *See, e.g.*, EIS, *supra* n. 4, at IV-340 to IV-341, IV-355. Unless reversed, the Opinion will have an increasingly disruptive impact on the DSIs over time as preference utilities develop more displaceable generating resources and a greater demand for BPA nonfirm power. This long-term impact is of major concern to DSIs now deciding where to concentrate future investment and production. *See, generally*, Mizer Affidavit, *supra* n. 99, at 25.

erate generating resources to substitute federal power—otherwise committed to the DSIs—for power they themselves produce and are statutorily obligated to use in supplying their own consumers. These few utilities in turn will sell their own power—now "displaced" with the DSIs' nonfirm power—at higher prices to entities other than their own retail consumers.[122] Congress understood the windfall that would accrue if utilities were allowed to divert and arbitrage DSI power, and consequently permitted interruption of DSI service only when necessary to protect firm loads from shortages of BPA power. The Opinion now makes possible under the Regional Act precisely what was prohibited by the Sixth Circuit under the TVA Act: the enrichment of a small group of preference utilities at the expense of all other regional power users. *See Volunteer*, 139 F. Supp. 22.

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[122] *See, e.g., id.* at 11-13; Witness Statement of Donald E. Long at 4-5, filed Sept. 10, 1981. Although all BPA preference utilities are represented by Respondent-Intervenor Public Power Council, only those few utilities with their own generators are able to exploit the power diverted from DSI loads because they alone produce power capable of being "displaced" and resold. The Ninth Circuit's failure to appreciate displacement—and the potential for windfall gain made possible thereby—leads to its incorrect conclusion that "[h]ere, the preference customers want the low-cost power for their customers." 686 F.2d at 715 n.9.

CONCLUSION

For these reasons the judgment of the Ninth Circuit should be reversed, and remanded with instructions to enter a new judgment confirming the administrative action challenged below and the lawfulness of the disputed DSI contracts.[123]

Dated: July 11, 1983

Respectfully submitted,

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[123]Respondents raised two other arguments below: that BPA's change in DSI restriction rights unlawfully increased the "amount of power" to which each DSI is entitled under the Regional Act, and that this change was made without proper observance of BPA's pre-Regional Act public involvement procedures for administrative changes in power marketing policies. Both issues are frivolous. *See* pp. 17, 24-26 *supra* (basis for BPA's interpretation that statutory phrase "amount of power" has same meaning as in 1975 contracts, not new meaning Respondents desire); *see also* nn. 51, 52 *supra* (BPA adopted and followed new post-Regional Act procedures for contract negotiations which Respondents took part in and did not challenge). In any event, neither argument can survive this Court's disposition of the principal issue: the reasonableness of BPA's interpretation that the challenged contract provisions are required by provisions of the Regional Act committing this power to the DSIs.

NO JS-6

82-1071

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE FORT MOJAVE INDIAN TRIBE, the CITY OF NEEDLES, California, a municipal corporation, the NEEDLES UNIFIED SCHOOL DISTRICT, and the NEEDLES-DESERT COMMUNITY HOSPTIAL DISTRICT, Plaintiffs, v. THE UNITED STATES OF AMERICA, the SECRETARY OF THE INTERIOR, the SECRETARY OF ENERGY, and the BUREAU OF RECLAMATION, Defendants.	CV 77-4790ALS ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This action came on regularly for hearing on March 20, 1978, pursuant to plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss or, alternatively, for summary judgment. The court heard oral argument, received the sworn testimony of certain witnesses, and accepted several affidavits. On March 28, 1978, the court denied plaintiffs' motion for a preliminary injunction by

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Minute Order. The court's Findings of Fact and Conclusions of Law were filed on April 7, 1978, and are incorporated herein by this reference.

Having considered the pleadings, briefs, affidavits and exhibits filed in this action, the testimony of the witnesses at the March 20th hearing, and the arguments of counsel, and being fully advised, the court has determined that the government's motion for summary judgment should be granted. Although certain factual matters are in sharp dispute (see ¶ 13 of the Findings of Fact filed April 7, 1978), those matters are not material to a resolution of the legal issues raised by the government's motion for summary judgment. See Rule 56(c), Federal Rules of Civil Procedure. The undisputed facts and the conclusions to be drawn therefrom, as set forth below, shall constitute the court's findings of fact and conclusions of law under Rule 52(a), Federal Rules of Civil Procedure.

I. The Facts--

This action involves the question whether plaintiffs are entitled to continue receiving hydro-electric power generated by certain Bureau of Reclamation dams along the Colorado River. The allocation of water from the Colorado River, and the sale of electric power generated by the power plants associated with the storage reservoirs along it, have occasioned much litigaton. See, e.g., Arizona v. California, 373 U.S. 546 (1963); Arizona Power Authority v. Morton, 549 F.2d 1231 (9th Cir.), cert. denied, 434 U.S. 835 (1977); Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721 (9th Cir.

1975), cert. denied, 425 U.S. 911 (1976); Citizens Utilities Co. v. United States, 149 F. Supp. 158 (Ct. Cl.), cert. denied, 355 U.S. 892 (1957). These cases provide an overview of the circumstances surrounding this action, and only such background information as is pertinent to the controversy at bar will be set forth.

The origins of this case lie in the initial allocation of electric power to be produced by the as-then uncompleted Boulder Canyon Project. In 1930 the Secretary of the Interior entered into a series of contracts with various entities, among them the City of Los Angeles, Southern California Edison ("Edison"), and the Metropolitan Water District of Southern California ("MWD"). The authority for these agreements was the Boulder Canyon Project Act, 43 U.S.C. § 617 et seq., which required the Secretary to obtain contracts which would produce sufficient revenue over a period of 50 years to repay the federal government, with interest, the entire cost of construction of the dam, plus its operation and maintenance. The City of Los Angeles and Edison undertook to lease parts of the generating facilities to be built, and committed themselves to take and pay for 64% of the electric power which was to be generated, although other entities could claim part of this amount. The MWD undertook to take and pay for 36% of the power to be generated, but it was only permitted to use its share of the power to pump water in the Colorado River Aqueduct, which also had not yet been built.

In 1937 the MWD determined that the amount of power for

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which it was obligated to pay would be in excess of its needs through the end of 1954, and proposed that the Secretary resell part of the power. Both the City of Los Angeles and Edison declined to exercise their options to take this surplus power, so the Secretary entered into contracts with various other entities, including Citizens Utilities Company and California-Pacific Utilities Company ("Cal-Pac"), under which these entities were permitted to take and pay for some of the MWD's surplus. Both Citizens Utilities' and Cal-Pac's contracts were to expire on December 31, 1954, and contained no provisions for renewal.

By 1945 the MWD had determined that its percentage of Boulder Canyon Project power, generated at the Hoover power-plant, would be in excess of its needs for the remainder of its 50-year contract. However, both the City of Los Angeles and Edison were then willing to exercise their options to take and pay for the MWD's surplus power. Accordingly, in May 1945 the Secretary contracted with the City of Los Angeles and Edison to take the unused portion of the MWD's power allocation, the sale becoming effective after December 31, 1954.

Although Citizens Utilities and Cal-Pac applied for renewal of their contracts in 1952, the Secretary refused to continue the agreements beyond December 31, 1954. Citizens Utilities and Cal-Pac ultimately filed suit to compel renewal, and in Citizens Utilities Co. v. United States, supra, the Court of Claims held that these two utilities were entitled

to renew their contracts within certain limitations. 149 F. Supp. at 163.

As a result of the Citizens Utilities Company litigation, Cal-Pac entered into Contract No. 14-06-300-802 with the Secretary of the Interior on April 30, 1958 (the "1958 agreement"). This agreement was subsequently amended in 1960, 1961 and 1962. One effect of these amendments was to change the source of the power for Cal-Pac's Needles District from the Hoover powerplant to the Parker-Davis Project, effective January 1, 1963. By its own terms, the 1958 agreement was to expire on December 31, 1977. In addition, the government notified Cal-Pac on September 3, 1974, that the contract would not be renewed. There is nothing in the record to indicate that Cal-Pac, as a party to the 1958 agreement, has ever objected to the government's decision not to renew the 1958 agreement.

For many years, ending on December 31, 1977, plaintiffs jointly were among the beneficiaries to the 1958 agreement between Cal-Pac and the federal government. During the winter months (October through February), Cal-Pac's Needles District received 4,500 kW of peak demand, some of which was resold to plaintiffs; during the summer (March through September) Cal-Pac received 6,000 kW of peak demand. This power was not apportioned by Cal-Pac to any particular customers, rather it was used to meet part of the needs of all the customers in the Needles District. The demand for power by Cal-Pac's customers in the Needles District exceeded the amount of

power available under the 1958 agreement in every month of 1977, and had done so for an indefinite period before that. For the calendar year 1977, the difference between Cal-Pac's customers' demand and the amount of power supplied by the Parker-Davis Project ranged from a low of 1,661 kW of peak demand in March to a high of 9,624 kW of peak demand in July. In order to meet its customers' demand, Cal-Pac purchased the balance of its requirements in thermally generated power pursuant to a contract with the State of Nevada. The Parker-Davis Project hydro-electric power supplied under the 1958 agreement was much cheaper than the steam-generated power Cal-Pac bought from the State of Nevada.

On April 4, 1975, subsequent to notifying Cal-Pac that the 1958 agreement would not be renewed, the Department of the Interior published a "Notice of Proposed Reallocation of Power" from the Parker-Davis Project and the Southern Division of the Colorado River Storage Project ("CRSP-SD"). 40 Fed. Reg. 15101 (1975). The CRSP-SD had 26,650 kW of firm power which had not previously been allocated. The Parker-Davis Project had a capacity of 254,000 kW, 39,000 kW of which had previously gone to priority uses (operation of irrigation and reclamation projects), 174,500 kW of which was permanently allocated, 19,500 kW of which was allocated on a withdrawable basis and reserved for future priority uses, and 21,000 kW of which was sold to private utilities. It is out of this latter 21,000 kW that Cal-Pac drew its share of hydro-electric power.

The April 4, 1975 "Notice of Proposed Reallocation of Power" set forth a reallocation scheme which attempted to integrate the allocation of available CRSP-SD and Parker-Davis Project power. Only the previously uncommitted 26,650 kW of CRSP-SD power was affected, while the whole of the Parker-Davis Project's capacity was to be reallocated. The primary effect of the Parker-Davis reallocation, however, was to redistribute the 21,000 kW previously sold to Citizens Utilities and Cal-Pac to other categories of users. The notice asked for comments on the proposed reallocation to be submitted to the Bureau of Reclamation on or before June 3, 1975. Nineteen interested parties submitted comments, and meetings were held on June 3, 1975 with the 4 entities which had requested them. None of the plaintiffs submitted comments or requested a meeting. On October 1, 1975, the Department of the Interior published the "Final Allocation of Power," together with comments concerning the changes from the previously published proposal. 40 Fed. Reg. 45209 (1975).

These power allocations were of what is known as "firm power" or "capacity with energy." Firm power is the amount the generating station can commit itself to deliver continuously. This is a conservative estimate, based on project installed capacity, water flows experienced and projected on the river, storage conditions, and requirements for reserves, plant use and losses. It also takes into account load diversity, which involves a calculation of when various customers will make their peak demands on the system. When

there is a higher-than-usual volume of water flowing down the river, the actual amount of power generated by the system may be higher than the calculated capacity required to serve the estimated load demand, upon which the allocations of firm power are based. In that case, there will be extra power available for sale on a short-term basis. In contrast, if river volume is greatly reduced, actual generating capacity may drop below the amount of firm power allocated. In this latter case, the government is required to turn to other sources and, if necessary, purchase power so that it can meet its firm commitments.

Firm power is to be contrasted with "peaking power" or "capacity without energy." Hydro-electric plants can vary their power output relatively easily by changing the amount of water flowing through the power plant, while thermal plants run more efficiently at a continuous, even rate. During periods of peak demand, the hydro-electric plants can increase their output to meet the demand by releasing a greater proportion of their daily water flow during those hours, thus providing peaking power. This peaking power must be repaid by the user, however, usually by returning thermally generated power into the electrical grid at off-peak hours. This return of power enables the hydro-electric plant to meet its power commitments to other users during the off-peak hours, while at the same time reducing its release of water and hence its power output. This distinction between firm and peaking power is important, because Cal-Pac's allocation of power

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under the 1958 agreement was, and what plaintiffs now are seeking is, a long-term allocation of firm power. See generally Transcript of Hearing of March 20, 1978, at 23-36; Affidavit of Robert A. Olson, filed March 20, 1978; Affidavit of Marlene A. Moody, filed March 1, 1978; Colorado River Storage Project, General Power Marketing Criteria, 43 Fed. Reg. 5559-64 (Feb. 9, 1978); Colorado River Storage Project, Notice of Proposed Allocation of Peaking Power, 40 Fed. Reg. 59362-64 (1975).

II. The Parties and Claims--

The plaintiffs must be divided into two groups for analytical purposes. The Fort Mojave Indian Tribe (the "Indian plaintiffs") is a duly recognized Indian tribe, whose reservation extends into areas of California, Arizona and Nevada near the Colorado River. The City of Needles ("the City") is a municipal corporation organized under the laws of the State of California. The Needles Unified School District and the Needles-Desert Community Hospital District are special districts which provide educational and medical services to the Needles area. For the purpose of this case, the legal position of the two districts is identical to that of the City, and they will collectively be referred to as the "non-Indian plaintiffs."

The defendants are the federal government, the Secretaries of Energy and the Interior, and the Bureau of Reclamation of the Department of the Interior. It should be noted, however, that on October 1, 1977, the power marketing functions

which had been handled for the Department of the Interior by the Bureau of Reclamation's Lower Colorado Regional Office in Boulder City, Nevada, were transferred to the Department of Energy. The responsible agency thus became the Western Area Power Administration's Lower Colorado Area Office. It appears that this transfer was merely administrative, with the functions and personnel being shifted from one department to another without any change in either their authority or the applicable law.

The first amended complaint sets forth five separate causes of action. The first is asserted only by the Indian plaintiffs, and is based on a theory of breach of fiduciary duty. The Indians claim that the defendants are the legal trustees of the Fort Mojave Indian Tribe, and owe a duty as trustees to make the Indian's assets (the utilization of their ancestral lands) productive. This duty is alleged to have been breached by virtue of a conflict of interest between the Bureau of Reclamation and the Bureau of Indian Affairs--the Bureau of Reclamation is asserted to be depriving the Indians of electric power which the Indians claim the Bureau of Indian Affairs is under an affirmative duty to provide. In this connection, the Indian plaintiffs rest on their claim to be preference customers entitled to a priority in the allocation of available power under the general reclamation laws, and they do not cite any statutes or treaties which would specifically grant them any given amount of power or power from any particular source.

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The second claim, also asserted solely by the Indian plaintiffs, is closely related. The Indians argue that they are entitled to a statutory preference in the allocation of power under section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c). The claim appears to be that as a member of the class of preference customers, the Indians are on equal footing with other preference customers, and since the federal government is in a fiduciary relationship with respect to the Indians, the fiduciary duties are properly discharged only by allocating power to the Indians. The Indians allege that the failure to allocate power to them constitutes an actionable breach of a statutory duty by the trustee.

The third cause of action, again asserted by the Indian plaintiffs alone, is for violation of the National Environmental Policy Act ("NEPA"). The Indians argue that the federal government's decision not to renew the 1958 agreement, and to reallocate the Parker-Davis Project power previously furnished to Cal-Pac, is governmental action which has a demonstrable effect on the environment. Since no Environmental Impact Statement was prepared and no public hearings were held on the environmental consequences of this action, the Indians claim the requirements of NEPA were not met.

The fourth cause of action is asserted only by the non-Indian plaintiffs. It alleges a denial of due process of law in that these plaintiffs, as preference customers under the

reclamation laws, "were never consulted, advised or otherwise dealt with by the defendants regarding a loss of their electrical lifeblood prior to a decision to so deprive them." This decision is claimed to have been made on or before September 3, 1974, when the government informed Cal-Pac the 1958 agreement would not be renewed. This decision is characterized as arbitrary and unreasonable administrative action, which plaintiffs claim is judicially reviewable under 5 U.S.C. § 702 and 28 U.S.C. § 1331.

The fifth cause of action again is alleged only by the non-Indian plaintiffs, and is essentially identical to the NEPA claim asserted by the Indian plaintiffs in the third cause of action. None of the plaintiffs seek monetary damages, but only declaratory and injunctive relief as to each cause of action.

III. Discussion--

The basic statute involved in this case is the Reclamation Project Act of 1939, and in particular section 9. Under section 9(c) of the Act (43 U.S.C. § 485h(c)), the Secretary of the Interior is authorized to enter into contracts for the sale of water and electric power contained by or produced in connection with federal reclamation projects. Although the Secretary is granted wide discretion as to whom electric power shall be sold, at what price, and upon what other terms, this discretion is not entirely unbounded. The most important qualification to this power for purposes of this action is contained in the "preference" clause of section 9(c), which

provides that "in said sales or leases preference shall be given to municipalities and other public corporations or agencies" and to REA cooperatives. This class of consumers is generally known as "preference customers." In almost every geographic area the demand for power by preference customers exceeds the supply; consequently, little power is sold to non-preference customers except under special statutory provisions, most of which antedate the Reclamation Project Act of 1939.

Cal-Pac, as an investor-owned utility, is not a preference customer. Its entitlement to power arose from unique circumstances, which have been set forth above. For the purpose of this motion only, the government has conceded plaintiffs' claim that each of the entitles joined as a party plaintiff qualifies for a section 9(c) preference. Since each of the plaintiffs is assumed to be a preference customer, and since it is undisputed that the demand for federal hydro-electric power from the Parker-Davis Project by preference customers alone far exceeds the amount available for sale, the principal question is how the available power should be apportioned among those preference entities which wish to purchase it. In this regard, the Court of Appeals' recent decision in City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir. 1978), is controlling.

The Santa Clara case involved the allocation of federally generated hydro-electric power from the California Central Valley Project. Although the authorizing legislation for the

Central Valley Project differs from that of the projects along the Colorado River, the authority under which the decision to allocate power is made is the same--section 9(c) of the Reclamation Project Act of 1939. While the Santa Clara decision does not directly touch on the Indian's fiduciary duty claims, it does discuss the justicability of the controversy at length, and directly addresses the due process, arbitrary administrative action, and NEPA claims raised here.

In Santa Clara, as in this action, the demand for electric power by preference customers far exceeded the amount available. The Court of Appeals was thus confronted with the question whether the Secretary of the Interior's power marketing decisions were judicially reviewable, or whether they were immune from judicial review as matters "committed to agency discretion by law" within the meaning of section 10 of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2).

Generally speaking, administrative decisions are subject to judicial review except where the exercise of that decision-making power is wholly discretionary, i.e., where there is "no law to apply" in judging the propriety of the action.

> "If . . . no law fetters the exercise of administrative discretion, the courts have no standard against which to measure the lawfulness of agency action. In such cases no issues susceptible of judicial resolution are presented and the courts are accordingly without jurisdiction."

City of Santa Clara v. Andrus, supra, 572 F.2d at 666.

The Ninth Circuit described the operation of the preference clause in the Reclamation Project Act of 1939 in these terms:

> "The preference clause requires only that public entities be given a preference over private entities in the marketing of power generated by federal reclamation projects. [Citation omitted]. It does not require that all preference customers be treated equally or that all potential preference customers receive an allotment. [Citation omitted]. Where, as here, one preference entity challenges the Secretary's decision to discriminate against it in favor of other preference entities, the reclamation laws provide no law to apply to the dispute. If he so chooses, the Secretary can market all available . . . power to a single public entity without running afoul of the preference clause."

Id. at 667 (emphasis in original). The court summarized its examination of the authorities in the following words:

> "We conclude that the Secretary's refusal to allocate nonwithdrawable power to Santa Clara is unreviewable because there is 'no law to apply.' The preference clause contained in the Reclamation Project Act of 1939 does not prevent the Secretary from discriminating against some preference entities to the benefit of others. . . . Decisions concerning the proper allocation of . . . power among preference entities are 'action committed to agency discretion by law'

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within the meaning of the APA and as such are unreviewable."

Id. at 668 (footnote omitted).

The first amended complaint does not allege that non-preference entities have been given an allocation of Parker-Davis Project or CRSP-SD power, but is only "one preference entity challeng[ing] the Secretary's decision to discriminate against it in favor of other preference entities . . . ." Id. at 667. Similarly, the first amended complaint does not challenge "the adequacy of procedures utilized in formulating the marketing scheme . . . ." Id. at 673; see id. at 672-75.

Plaintiffs attempt to avoid the conclusion that Santa Clara makes the Secretary's decisions non-reviewable here by arguing that they were never given an opportunity to apply for power as preference entities before the 1975 reallocation was finalized. This circumstance, they submit, makes this case more closely resemble Arizona Power Pooling Ass'n v. Morton, supra, than it does Santa Clara. There are two flaws to this argument. The first is that it was undisputed that non-preference entities had been permitted to contract for power in Arizona Power Pooling, while there were preference customers who wished a firm power allocation. In this case there is no allegation that any non-preference customer received an allocation of power when the Parker-Davis Project and CRSP-SD reallocations were made in 1975. The second flaw lies in the fact that while the allocations in Arizona Power Pooling were apparently made without notice to interested

individuals, in this case public notice was given.

Although it is true that in 1974 the government did not notify Cal-Pac's customers, as opposed to Cal-Pac itself, that the 1958 agreement would not be renewed, no authority has been cited for the proposition that notice to the customers was required. When the Bureau of Reclamation was ready to undertake the reallocation, both the "Notice of Proposed Reallocation of Power" and the "Final Allocation of Power" were published in the Federal Register. 40 Fed. Reg. 15101 (1975); 40 Fed. Reg. 45209 (1975). That publication was sufficient as a matter of law to put plaintiffs on notice of the proposed administrative action and of their right to be heard concerning the proposal. 44 U.S.C. §§ 1507-08. Consequently, this case is legally indistinguishable from Santa Clara, and the court concludes that the Secretary's decision not to grant plaintiffs an allowance of power during the 1975 reallocation is not judicially reviewable.

Santa Clara also forecloses the due process claim that the non-Indian plaintiffs have raised. The Court of Appeals held that the plaintiffs there "ha[d] no 'property' interest in CVP power as against other preferred entities and consequently no procedural safeguards are constitutionally required in deciding between them." 572 F.2d at 676. That conclusion applies with equal force to this action.

The NEPA claims raised by all the plaintiffs are also precluded by Santa Clara. The Ninth Circuit held that the decision to allocate or withdraw power was not a "major

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Federal project" which could be characterized as "significantly affecting the quality of the human environment" within 42 U.S.C. § 4332(a)(C). The court's comment was:

> "Because the amount of low cost CVP power is finite, demand will likely outstrip supply in the future as it has in the past. Regardless of whether it is Santa Clara or some other preference entity that is forced to look to private sources for the supply of electric power, the environmental consequences will be similar. If the demand for power exceeds the available supply, then new generating facilities must be constructed somewhere, if not in Santa Clara.
>
> Even accepting as true Santa Clara's rather fanciful hypotheses concerning the likely impact of the Secretary's decisions on its small piece of the environment, we think it highly improbable that one allocation scheme will have a more deleterious impact than any other when the total geographic area served by the CVP is considered. . . . [A]n agency must consider 'in deciding whether a major federal action will "significantly" affect the quality of the human environment . . . the absolute quantitative adverse environmental effect of the action itself.' No such absolute effects are threatened by the Secretary's decision to allocate CVP power in one way rather than another."

City of Santa Clara v. Andrus, supra, 572 F.2d at 680.

A careful review of the first amended complaint and the

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various affidavits which have been filed reveals no factual averments which would distinguish the claimed environmental impact from that asserted in Santa Clara. The Indian plaintiffs argue that their agricultural economy will be injured by the increased cost of pumping irrigation water, and the non-Indian plaintiffs similarly claim injury from the increased cost of all-thermal electric power over the former thermal/hydro-electric mix. This is not a case where plaintiffs either receive Parker-Davis Project power or no power at all; on the contrary, their power demands are being met in full by Cal-Pac from the supply of thermal power which Cal-Pac is purchasing from the State of Nevada. Unlike Santa Clara, there is no claim that any environmentally degrading power plants will have to be constructed in the Needles area. Neither construction of new generating plants and transmission lines, nor destruction of existing facilities, was required by the reallocation. Accordingly, the court finds that the power reallocation at issue here was not a "major Federal [action] significantly affecting the quality of the human environment" within the meaning of the National Environmental Policy Act, and hence neither an EIS nor public hearings were necessary.

The one issue raised by the plaintiffs which was not resolved by Santa Clara is the Indian plaintiffs' claim that the federal government has breached a fiduciary duty owed to the Fort Mojave Indian Tribe by not giving them a firm allocation of Parker-Davis Project power. This contention

may be resolved on the legal question whether such a duty exists, and is thus susceptible to resolution via summary judgment.

As noted above, except for section 9(c) of the Reclamation Project Act of 1939, no statute, regulation or treaty has been cited in support of this contention. To the extent that the Indian plaintiffs purport to find a duty imposed upon the government in the preference clause, the breadth of the Secretary's discretion in power marketing decisions recognized by the Court of Appeals in Santa Clara negates the existence of an actionable "duty." This is not the only string to the Indians' bow, however, since there appear to be two alternative theories raised. First, it is argued that since the Fort Mojave Indian Tribe has rights to irrigation water from the Colorado River, and water is used to generate power, they also have the right to an allocation of hydro-electric power. Second, the Indian plaintiffs contend that the Bureau of Indian Affairs is under an affirmative duty, as a trustee, to supply the Fort Mojave Indian Tribe with low-cost electric power so that the Indians' assets--the utilization of their anscestral lands--can be made productive. This affirmative duty, it is argued, is in conflict with the Bureau of Reclamation's decision not to allocate firm electric power to the Indians.

The Fort Mojave Indian Tribe has "Winters doctrine" rights to irrigation water from the Colorado River. See Winters v. United States, 207 U.S. 564, 576 (1908). These rights were

specifically reaffirmed in Arizona v. California, supra, 373 U.S. at 595-601, and were quantified in the Supreme Court's decree. Arizona v. California, 376 U.S. 340, 345 (1964). That decree, however, only dealt with the apportionment of the "consumptive use" of water from the Colorado River, and neither the opinion nor the decree in Arizona v. California made any mention of rights to hydro-electric power generated through use of mainstream flow. The generation of hydro-electric power is not a consumptive use of the water, and the use of the river to generate power has been given a lower priority than either flood control or irrigation and other consumptive uses. See Boulder Canyon Project Act § 6, 43 U.S.C. § 617e, quoted in Arizona v. California, supra, 373 U.S. at 584. The need for and right to consumptive uses of water bears no relationship to the need for and claim to hydro-electric power by any individual or entity. Finally, water for consumptive use is a limited resource in ways that electricity is not, and the pressing reasons which impelled the Supreme Court to make a final allocation of water for consumptive use are not present here. See Arizona v. California, supra, 373 U.S. at 550-64. For these reasons, Winters doctrine rights do not provide a basis for a claim to an allocation of power generated by the river's flow.

The question whether the federal government has breached a duty as trustee to supply electric power to the Indians is a more difficult matter. "There is no doubt that the United States serves in a fiduciary capacity with respect to these

Indians and that, as such, it is duty bound to exercise great care in administering its trust." United States v. Mason, 412 U.S. 391, 398 (1973). Yet merely reciting this principle fails to convey any notion as to its content. As best as can be determined from the first amended complaint, the Indian plaintiffs are alleging (1) that the Bureau of Indian Affairs is under an affirmative duty to supply low-cost electric power to the Fort Mojave Indian Tribe so that the Indians' assets--their agricultural lands--can be irrigated and hence made productive; and (2) that the Bureau of Reclamation's refusal to supply federal hydro-electric power to the Indians places it in conflict with the affirmative duty owed by the Bureau of Indian Affairs, and hence the Department of the Interior has a conflict of interest which must be resolved in favor of the Indians.

The Indians' argument thus rests on the assertion that one component of the Bureau of Indian Affairs' duty toward them is to provide not just electric power but a supply of low-cost electric power. Plaintiffs cite neither direct statutory nor judicial authority for this proposition. Rather, it is claimed to flow from the trustee's duty to make trust assets productive. Yet the cases plaintiffs cite in support of this argument--Manchester Bank of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973), and Menominee Tribe of Indians v. United States, 59 F. Supp. 137 (Ct. Cl. 1945)--are not on point. Both cases involved the government's mismanagement of funds generated by tribal

enterprises. The government held the funds in trust accounts, but either failed to credit any interest to the accounts or credited too low a rate. In this case, it appears that the Indians, and not the government, have active management and control over the trust assets which the Indians claim the government is responsible for making productive.

The Fort Mojave Indian Tribe is organized under the provisions of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq. Under section 16 of the Act (25 U.S.C. § 476), the Indians "operate under a recognized system of self-government, with a constitution and a business charter which cannot be revoked or surrendered except by Act of Congress." Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1255 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977); see Affidavit of Llewellyn Barrackman, filed Jan. 25, 1978. Although the government holds title to the reservation land in trust for the Fort Mojave Indian Tribe as a whole, the elected leaders actively manage the trust lands in accordance with the tribal economic development plan. The extent of this management power is illustrated by the fact that the Indians have entered into 99-year leases with non-Indians for development of part of the reservation. Fort Mojave Tribe v. County of San Bernadino, supra. This substantial control, exercised directly by the Indians, argues strongly against the existence of the asserted duty on the part of the government to supply low-cost electric power.

The fact that the Commissioner of Indian Affairs

interceded on behalf of other Indian tribes along the Colorado River in the 1975 reallocation of Parker-Davis Project and CRSP-SD power (see 40 Fed. Reg. 15101 (1975)) does not advance plaintiffs' argument. The record is devoid of any information which would explain either what impelled that intervention, or why it was made on behalf of other tribes but not the Fort Mojave Indians. Indeed, although that intervention may have been influential, given the discretion vested in the Secretary of the Interior in making power marketing decisions, that intervention cannot be said to have compelled the allocation of any particular amounts of power to any particular entities. Further, plaintiffs have not named the Bureau of Indian Affairs as a party defendant, although the Bureau of Reclamation is named, and the first amended complaint contains no factual allegations that the Bureau of Indian Affairs, as opposed to the Bureau of Reclamation, has done or failed to do any act which would fall short of fulfillment of its fiduciary duty.

Finally, it is important to note that the power to which the plaintiffs claim to be entitled has never heretofore been recognized as "theirs." On the contrary, the power entitlement has always belonged to Cal-Pac. None of the plaintiffs have ever had an interest in the power other than as incidental beneficiaries to the 1958 agreement, although under that agreement both the City and the Indians had the right, if they acquired their own distribution system, to contract directly with the Bureau of Reclamation for part of Cal-Pac's

hydro-electric power. Plaintiffs did not take up that opportunity prior to the expiration of the 1958 agreement. Each of the plaintiffs has contracted with Cal-Pac for the delivery of electric power from whatever source Cal-Pac purchases it. On these facts, and on the authorities plaintiffs have cited, the assertion that the Bureau of Indian Affairs is under an affirmative duty to supply the Indian plaintiffs with hydro-electric power is unsupported. Accordingly, the court holds that, as a matter of law, the Bureau of Indian Affairs is under no such affirmative duty toward the Fort Mojave Indian Tribe.

It is well recognized that the interests and responsibilities of the Bureau of Indian Affairs may differ from those of other sections of the Department of the Interior, and that a conflict of interest may thereby arise within the Department. See, e.g., Navajo Tribe of Indians v. United States, 364 F.2d 320 (Ct. Cl. 1966)(Bureau of Mines); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973), rev'd on other grounds, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975)(Bureau of Reclamation). In this case, however, no such conflict has arisen. The Bureau of Indian Affairs has no affirmative duty to provide low-cost electric power to the Indian plaintiffs, as contrasted with the fiduciary duties with respect to the oil and gas leases in Navajo Tribe or the Paiute's water rights in Pyramid Lake. Since none of the plaintiffs here have any rights to electric power superior to those of other

potential preference customers, and since the allocation of power among competing preference customers is "committed to agency discretion by law," the court concludes that the Department of the Interior has not been guilty of a breach of fiduciary duty or a conflict of interest in its power allocation as a matter of law.

It should also be noted that the 1975 power reallocation scheme made provision for the future needs of the Indians along the Colorado River for electric power for irrigation. This was done by allocating 19,500 kW of summer peak demand and 13,900 kW of winter peak demand to non-Indian preference customers on a "two-year withdrawable" basis. This power is available for the Fort Mojave Indian Tribe upon application, and the Indians have had actual knowledge of the availability of this power since at least September 1976. See 40 Fed. Reg. 15102 (1975); 40 Fed. Reg. 45210 (1975); Affidavit of Marlene A. Moody, filed Mar. 1, 1978. The record is unclear whether the Indian plaintiffs have actually submitted an application for two-year withdrawable power for irrigation purposes.

For the reasons set forth above, the court concludes that the defendants are entitled to summary judgment. The Secretary of the Interior's power marketing decision, when all the power is apportioned among priority uses and preferences customers, is judicially unreviewable under City of Santa Clara v. Andrus, supra, as a matter "committed to agency discretion by law." As preference customers, plaintiffs have no constitutional rights under the due

process clause as against other preference customers in determining the allocation of electric power between them. Neither an Environmental Impact Statement nor public environmental hearings were necessary under the National Environmental Policy Act, as the power marketing decisions at issue here were not major Federal projects significantly affecting the quality of the human environment. Finally, the Bureau of Indian Affairs has no affirmative duty to supply the Indian plaintiffs with low-cost federal hydro-electric power, and as a matter of law the defendants have not breached any fiduciary duty they may have toward the Indians.

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Counsel for both sides are directed to file appropriate documents within ten days if they believe any Findings or Conclusions necessary to the foregoing decision have been omitted or erroneously stated. Counsel for the government is directed to file a form of separate judgment.

IT IS SO ORDERED.

DATED: July 6, 1978

United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARKANSAS POWER & LIGHT COMPANY, et al.,

Plaintiffs,

v.

JAMES R. SCHLESINGER, Secretary of Energy, et al.,

Defendants.

82-1071

Civil Action No. 79-1263

MEMORANDUM OPINION

This matter comes before the court on cross-motions for summary judgment. The facts from which the suit arises are not disputed.

In the early 1950s the United States government contacted the plaintiffs, Arkansas Power and Light Company and Reynolds Metal Company, regarding possible production of aluminum at a new site in Arkansas. Following lengthy negotiations, in January, 1952, plaintiffs entered into a contract with the Southwestern Power Administration (SWPA). SWPA was established by the Secretary of Interior in 1943 to dispose of electrical power and energy generated by federally-owned reservoir projects in six southwestern states.

The contract at issue obligates SWPA to provide electricity to plaintiffs for a thirty-year period beginning January 1, 1954 and ending December 31, 1983. The original contract specified fixed prices for certain amounts of electricity and allowed for limited price increases over time. A supplemental agreement dated April 25, 1952 modified the original contract by providing for certain maximum rate increases at the end of each five-year period in the thirty-year contract.

On April 28, 1952, the Federal Power Commission (FPC) confirmed and approved the schedule of rates and charges in the contract as supplemented by the April 25, 1952 modification. 1/ The FPC specifically found that the rates and charges conformed to the standards set forth in section 5 of the Flood Control Act of 1944. 11 F.P.C. 959, 960 (1952).

Following approval of the contract by the FPC, Reynolds built a new aluminum plant at a cost of nearly $38 million and Arkansas Power and Light constructed new transmission lines and other facilities at a cost of $6 million. The plant was placed in operation and service under the contract began in late 1953.

Pursuant to directions from the Secretary of Interior to eliminate a financial deficit in its operations, on March 1, 1979, SWPA raised the prices it charges plaintiffs for electricity above those allowed by the contract. Order Confirming, Approving, and Placing Increased Power Rates In Effect On Act Interim Basis, 44 Fed. Reg. 13,068 (March 1, 1979). Plaintiffs then filed this action for breach of contract.

The government contends that the price increase at issue was not only allowed, but required by section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s. That section provides that

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1/ The authority to confirm rates under Section 5 of the Flood Control Act was transferred to the Secretary of Energy by Section 402 of the Department of Energy Organization Act, 42 U.S.C. § 7171 et seq. The transfer has no effect on the outcome of this case.

> Rate schedules shall be drawn having regard to the recovery...of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives.

The core issue then, is whether the Flood Control Act permits the government to abrogate contracts when they have proven inadequate to cover the costs of supplying electric power.

The government finds some support in Associated Electric Cooperative, Inc. v. Morton, 165 U.S. App. D.C. 344, 507 F.2d 1167 (1974), cert. denied, 423 U.S. 830 (1975). There the court upheld the authority of the Secretary of the Interior to collect increased charges under section 5 of the Flood Control Act. An important distinction between the case and this one is that there the court found that the increased charges were authorized by the contract at issue. 2/ In this case it is not disputed that the increased charges SWPA have imposed are not allowed by the contract. See 11 F.P.C. 959, 960 (1959) (setting maximum permissible increases for each five-year period during the life of the contract).

However, in dictum the Associated Electric Cooperative court noted,

> Even assuming that the transmission charges were precluded by the terms of the...contract, the transmission charge is nevertheless within the Secretary's rate-making power under the Flood Control Act. It is well settled that a Government agency cannot contract in derogation of its statutory powers.

2/ The contract at issue in Associated Electric Cooperative clearly indicated that "rates may be increased or decreased by SWPA, subject to approval of the FPC." Associated Electric Cooperative, Inc., supra, 507 F.2d at 1172.

507 F.2d at 1173 n.17. This would allow the government to repudiate a contract which was invalid at the time it was entered into. Cf. Grand River Dam Authority v. National Gypsum Co., 352 F.2d 130 (10th Cir. 1965).

The contract at issue in this case was valid when it was entered into in 1952. Clearly it was drawn with regard to recovery of costs, because as indicated above, the provisions relating to rates and charges were modified to enable the FPC to make the finding required by law that the contract conformed to section 5 of the Flood Control Act. No evidence indicates that the rates were not adequate to cover costs when they were established in 1952.

The dictum in Associated Electric Cooperative is not authority for the proposition that the government can alter or repudiate a contract which was valid at the time it was entered into, but later becomes disadvantageous because of changing economic conditions. Similarly, nothing in the legislative history cited to this court indicates that Congress intended the Flood Control Act to give the government authority to unilaterally alter existing contracts.3/

This case is closely analogous to Grand River Dam Authority, supra. There a state dam Authority was required by statute to charge rates for water and power sufficient to meet operating and maintenance costs. The Authority entered into a twenty-five year contract for sale of water and steam. Ten years later it attempted to raise the rates above contract levels.

3/ This is also consistent with the position the FPC took in 1957 when the Secretary of Interior sought approval of a new rate schedule inconsistent with that established in the contract. Denying the Secretary's request, the FPC stated that it did not have the power to determine that rates specified in a previously executed contract are no longer effective. 18 F.P.C. 153, 156 (1957).

The court noted that the Authority was obligated to set rates which would comply with the statute, and that it presumably performed that duty. The court held that

> The fact, if it be a fact, that actual experience has shown the prospective determination of the rates, although fully adequate at the beginning of the contract term, later turned out to be inadequate, does not retroactively make the initial determination improper or unlawful and does not render void the contract rates.

352 F.2d at 138. The same reasoning applies in this case and leads the court to conclude that the Flood Control Act does not authorize revision of this contract. 4/

The government also contends that the last sentence of section 5, which establishes a preference for public bodies and cooperatives in the allocation of federally-owned power, requires higher prices to be charged to the plaintiffs. According to the government, to allow the present non-compensatory rates to remain in effect would be to force SWPA to charge higher rates to its other buyers, including public bodies and cooperatives, in direct contravention of the statutory preference.

However, the government admits that the demand for power by preference entities was less than the available supply of power and that the allocation of power to plaintiffs was permissible at the time the contract was originally executed. Defendants' motion at 23. Determination of compliance with statutory preference requirements, like that of recovery of costs, must be made at the time the contract is executed and is not intended to permit subsequent revision of power contracts. City of Anaheim v. v. Kleppe, 590 F.2d 285 (9th Cir. 1978); City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), cert. denied, 439 U.S. 859 (1978).

4/ This conclusion makes it unnecessary to consider whether defendants' actions comported with procedural rulemaking requirements.

Plaintiffs entered into a long-term contract with provisions for periodic rate increases up to specified maximums in order to protect themselves from changing economic conditions. A change in precisely those conditions does not afford the government a justification for unilaterally altering the disputed contract.

An appropriate Order accompanies this Memorandum Opinion.

H. Thomas Austern
UNITED STATES DISTRICT JUDGE